S. HRG. 99-966

GOVERNMENT LIABILITY FOR ATOMIC WEAPONS TESTING PROGRAM

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY UNITED STATES SENATE

NINETY-NINTH CONGRESS

SECOND SESSION

ON

S. 2454

A BILL TO REPEAL SECTION 1631 OF THE DEPARTMENT OF DEFENSE AUTHORIZATION ACT, 1985, RELATING TO THE LIABILITY OF GOVERNMENT CONTRACTORS FOR INJURIES OR LOSSES OF PROPERTY ARISING OUT OF CERTAIN ATOMIC WEAPONS TESTING PROGRAMS, AND FOR OTHER PURPOSES

AND ON

H.R. 1338

AN ACT TO AMEND TITLE 28, UNITED STATES CODE, TO ALLOW SUITS AGAINST THE UNITED STATES FOR ACTS OR OMISSIONS OF CONTRACTORS IN CARRYING OUT THE ATOMIC WEAPONS TESTING PROGRAM, AND TO SUBSTITUTE THE UNITED STATES AS THE PARTY DEFENDANT IN SUITS BROUGHT AGAINST SUCH CONTRACTORS

JUNE 27, 1986

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GOVERNMENT LIABILITY FOR ATOMIC WEAPONS TESTING PROGRAM—S. 2454 AND H.R. 1338

FRIDAY, JUNE 27, 1986

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met at 10:05 a.m., pursuant to notice, in room SD-226, Dirksen Senate Office Building, Hon. Mitch McConnell (acting chairman) presiding.

Also present: Senator Simon.

Staff present: Mike Regan, staff counsel; Neil Trautwein, staff assistant; and Mark Contrerras, minority legislative assistant.

OPENING STATEMENT OF SENATOR MITCH McCONNELL

Senator MCCONNELL [presiding]. The hearing will come to order.

I will be chairing this hearing today on behalf of Chairman Thurmond. I would like to commend him for his leadership in calling this hearing to explore the legal issues surrounding the Feres doctrine and section 1631 of the Department of Defense Authorization Act of 1985.

Senator Thurmond may or may not be by, as I indicated earlier, and I will be asking some questions on his behalf of the witnesses that we have here.

At this point, without objection, Senator Thurmond's prepared statement will be inserted in the record.

[The prepared statement of Senator Thurmond follows:]

PREPARED STATEMENT OF CHAIRMAN STROM THURMOND

The Senate Judiciary Committee today considers various pending legislation, some of which would repeal Section 1631 of the Department of Defense Authorization Act in 1984 and another which would remove the long standing defenses available to the United States government in such suits. This legislation has been offered in an attempt to provide legal recourse to people exposed to radiation as a result of atomic weapons testing. These are difficult and complex issues which have been the subject of numerous hearings in both Houses of Congress.

As a member of the Veterans' Affairs Committee, I am fully aware and deeply sensitive to the broad scope of these issues. The focus of the Judiciary Committee will concentrate on the legislation before us and its impact on the judicial process.

Since the passage of Section 1631 there has been concern expressed about the availability of remedies for those who believe they have been exposed to radiation from atomic weapons testing. That amendment provided that government contractors in atomic energy defense programs are instrumentalities of the federal government and, as such, are not subject to suit by private individuals for effects possibly derived from activities associated with the research, development, and testing of nuclear weapons.

Many now fear that the result of that amendment, however unintended, may be the effective denial of an adequate remedy to redress illness or injury for those exposed to radiation. The legislation before us is intended to correct this situation.

We have an excellent and distinguished group of witnesses appearing before the Committee and I look forward to carefully reviewing their testimony on this important issue.

Senator MCCONNELL. The committee is meeting today to receive testimony concerning the legal questions surrounding the issue of veterans and civilians who were exposed ionizing radiation and who may be suffering as a result of that exposure.

Of particular interest to us today will be the evolution in the manner in which the suits have been handled and respective liabilities distributed. I would like to stress at the outset that the legal issues surrounding this problem are relatively new to me and that I am not here today to make any particular judgment about the relative merits.

I am here to listen to the testimony of the distinguished witnesses and to join my colleagues in exploring the complex issues before the committee today.

I do not see my colleague, Senator Domenici, yet, but I hear that Congressman Boucher is here and I would like to call him forward at this point.

Before we take you, Congressman, Senator Murkowski has a statement which I would like to make part of the record at this point.

[The prepared statement of Senator Murkowski follows:]

PREPARED STATEMENT OF SENATOR FRANK H. MURKOWSKI

Mr. Chairman, there are few issues which evoke in individuals such strong views as the possible health effects of ionizing radiation exposure. To say that this issue is a sensitive matter is an understatement.

In the forty years since the first atomic weapons test, Congress has been deeply involved in matters relating to ionizing radiation exposure.

Numerous hearings have been held on the historical events surrounding the tests, the research concerning the possible health effects of radiation exposure, and the VA's adjudication of radiation-related benefits claims. Legislation has been enacted, and extended, to provided specific VA health-care eligibility for veterans exposed to radiation. And two years ago, Congress passed legislation to require the VA to establish a uniform claims adjudication process for radiation-related claims. Although the Congress had addressed some of the concerns of these individuals, serious questions still remain.

Today you are holding hearings on a very specific aspect of this issue—the federal government's liability for the possible effects of radiation exposure from participation in the U.S. atomic weapons testing program. I commend you and the members of the Committee for holding today's hearing. As Chairman of the Committee on Veterans' Affairs, I appreciate the opportunity to speak to you about this issue as it relates to our Nation's veterans.

As you know, I have been involved for some time with issues relating to veterans who were exposed to ionizing radiation during their participation in the atomic weapons testing program. I held hearings last November to consider the VA's adjudication of radiation-related claims and the impact of section 1631 of the DOD Authorization Act of 1985 on veterans. Based upon the testimony received at the hearings, serious questions have been raised as to whether the VA's claims adjudication process should be the only mechanism available for veterans who seek redress for disabilities they believe to be related to their exposure to ionizing radiation. Though the administrative avenue is an important one and an integral part of the VA's compensation system, I believe that veterans must be afforded the fullest possible opportunity to seek redress. On May 15, I along with my colleagues Senators Simon, Warner, Cranston, DeConcini, and Denton introduced S. 2454 to repeal section 1631 as a vehicle for deliberation on this very important issue. Section 1631 effectively bars judgments on behalf of claiments in suits brought against contractors who par-

ticipated in the atomic weapons testing program. S. 2454 would restore to individuals the right to seek redress in court for acts or omissions of atomic weapons contractors in carrying out the atomic weapons testing program.

Mr. Chairman, S. 2454 raises questions that must be addressed. That is why you have scheduled these hearings—and I appreciate your pursuit of this matter. Based upon the information I have received, I believe the Committee could consider several possible courses of action. First, S. 1631 could be repealed in full or in part. Second, modification could be made to the Federal Tort Claims Act. Third, changes to the "Feres doctrine" could be approved. Fourth, an entirely new and specific alternative system of compensation could be developed. And last, no course of action could be taken at all.

I do not presuppose the outcome of the Committee's deliberations on this matter. I believe S. 2454 is an appropriate vehicle for discussion of these most important issues. I would encourage the Committee to consider the legal effect of S. 2454, as well as these other options.

The country, the government, and particularly those veterans who participated in the test program would be well served if we could resolve these issues once and for all. I am hopeful that these hearings today will go a long way towards resolving the issue of meaningful access to the Judicial system by individuals exposed to ionizing radiation in connection with U.S. stomic weapons tests.

STATEMENT OF HON. RICK BOUCHER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF VIRGINIA

Mr. BOUCHER. Thank you.

Senator MCCONNELL. Congressman, we are glad to have you with us. Go right ahead.

Mr. BOUCHER. Thank you very much, Mr. Chairman. It is my privilege to appear before this committee today to testify in support of H.R. 1338, which was approved without opposition in the House of Representatives last month, and also in support of S. 2454.

Veterans and others who may have sustained injury as a consequence of their participation in the atomic weapons testing program were deprived of their day in court by a 1984 amendment to the fiscal year 1985 Defense Authorization Act. Both H.R. 1338 and S. 2454 are designed to restore that right.

The 1984 amendment substituted the United States as a defendant in cases brought against the contractors who actually performed atomic weapons tests. Now, on the surface I would suggest to the committee that that amendment has some intuitive appeal.

Senator MCCONNELL. Let me interrupt you for just a second, Congressman.

Senator Domenici, why do you not join the Congressman and as soon as he finishes we will go right to you.

Go ahead.

Mr. BOUCHER. I would suggest to the committee that that amendment on the surface has some intuitive appeal because under the old contractual arrangements that existed between the Federal Government and the atomic weapons testers, the contractors were indemnified for all litigation costs, including the actual expenses of the litigation as well as any settlements or judgments that might be paid because of injuries arising out of the atomic weapons testing program. The 1984 amendment merely eliminated the little man between the injured party and the ultimately financially responsible party. But the amendment, Mr. Chairman, was flawed because as a consequence of its enactment the United States is going to avoid liability for most of the injuries that are suffered.

The military claims will be barred under the Feres doctrine which precludes veterans from suing the Federal Government for injuries sustained while they were on active duty. Civilian claims will be barred under the Federal Employees Compensation Act.

So the practical result of the 1984 amendment is to leave the vast majority of those who were injured because of their participation in the atomic weapons testing program with no legal remedy and with no hope of recovery.

H.R. 1338 corrects that unfortunate result by permitting injured parties to sue the United States and making available to the United States only those defenses that the contractor could have used. Therefore, the claims by veterans who were injured while they were in uniform will no longer be barred by the Feres doctrine, and the Federal Employees Compensation Act will no longer bar the suits of Federal civilian employees.

In contrast, S. 2454 repeals the 1984 amendment, thereby allowing suits against the contractor, in essence returning the law to its pre-1985 condition.

I would suggest, Mr. Chairman, that the approach taken by the House is preferable, and I would suggest it for this reason: I think it makes a certain amount of sense to have the financially ultimately responsible party being the target of the litigation.

It seems to me that the United States, since it would in any event be involved in the defense of the case, should be the only defendant in the case. We ought to go ahead and remove the contractors from the litigation. H.R. 1338 accomplishes that result.

But H.R. 1338 by its terms does not repeal the 1984 amendment. The committee might want to consider making the text of S. 2454 an amendment to H.R. 1338.

The issue, Mr. Chairman, is really one of simple equity. In 1984, we adopted an amendment which removed the right that previously was enjoyed by many, and that was the right to a day in court. These bills are designed to restore that right.

The bills say to America's atomic veteran that we will not forget the contributions that they made to our national defense, nor will we allow the injustice that was perpetrated in 1984 to continue.

H.R. 1338 would neither ease their burden of proof nor help them overcome other legal obstacles that they would have to surmount in making their case, but it would say that in 1984 this Congress made a mistake, a mistake that we are prepared to correct this year.

Thank you very much, Mr. Chairman. I appreciate the opportunity to be here.

[The prepared statement of Mr. Boucher follows:]

PREPARED STATEMENT OF CONGRESSMAN RICK BOUCHER

Mr. Chairman, thank you for the opportunity to appear before your Committee today to discuss H.R. 1338, which was approved by the House of Representatives on May 12 without opposition, and S. 2454.

In 1984, Congress, in its rush to adjournment, adopted an amendment to the 1985 Department of Defense Authorization Act which stripped from veterans and others who may have sustained an injury as a result of their participation in the atomic weapons testing program their right to a day in court.

The 1984 amendment effectively eliminated the middle man, that is the contractors, between the injured party and the financially liable party.

H.R. 1338 and S. 2454 are designed to restore that right.

The 1984 amendment substituted the United States as defendant in those cases in which a claim is brought against a federal contractor for injuries arising out of the atomic weapons testing program.

On the surface Mr. Chairman, this change does have some intuitive appeal.

In contracting the atomic weapons testing program, the government provided indemnification for any costs of litigation, judgments or settlements by the contractors relating to the atomic weapons testing program.

In addition, as the United States was liable for such costs, the government has already played a major role in the defense of charges brought by atomic veterans against the contractors.

Due to the applicability of the Federal Tort Claims Act, however, the United States will avoid liability for most injuries suffered.

Military claims against the United States would be barred by the Federal Tort Claims Act and the Feres Doctrine, which preclude veterans from suing the United States for injuries sustained while on active duty.

Civilian claims are barred by provisions of the Federal Employees Compensation Act.

The practical result of the 1984 amendment is to leave the vast majority of those harmed by the atomic weapons testing program with no legal remedy and no hope of recovery.

H.R. 1338, which I introduced, corrects this unfortunate effect by giving injured persons a right to sue the United States, which in turn would have only those defenses previously available to the contractor who performed the test.

It gives real teeth to the intuitively appealing, but legally flawed, provisions of the FY 85 DOD Authorization Act.

In contrast, S. 2454, introduced by Senators Murkowski, Warner, Simon, Cranston, DeConcini and Denton, repeals the 1984 amendment, thereby allowing suits against the contractors.

S. 2454 is partially subsumed in H.R. 1338 which provides that if such suits are filed against the contractors, the United States is substituted as the party defendant.

Mr. Chairman, one question which remains unresolved is whether or not H.R. 1338 repeals, by implication, the 1984 amendment.

A survey of reported case law prepared by the American Law Division of CRS suggests that this may not be the case; that in the absence of "irreconcilable" differences between H.R. 1338 and the 1984 amendment, the courts would not give their imprimatur to the "repeal by implication" argument.

I would suggest that this Committee consider adopting S. 2454 as an amendment to H.R. 1338.

Such an approach would resolve the outstanding question of "repeal by implication" and retain the public policy initiative embodied in the 1984 amendment; that is, substitution of the U.S. as the defendant in suits filed for injuries sustained in the atomic weapons testing program.

By adopting S. 2454 as an amendment to H.R. 1338, we would however, preserve the right of injured parties to a day in court; the objective of both bills.

The issue before the Committee is really one of simple equity.

During the 98th Congress, we adopted a proposal which removed a right previously enjoyed by those involved in the atomic weapons testing program: the right to a day in court.

H.R. 1338 restores the right.

It says to America's atomic veterans that we will not forget your contribution and your sacrifice to our national defense, nor will we allow this injustice to continue.

As amended, H.R. 1338 would neither ease their burden of proof nor address other legal obstalces which must be overcome in such litigation. It does say to the men and women who may have sustained an injury that Congress made a mistake last year, a mistake that we are going to correct.

Mr. Chairman, thank you again for the opportunity to testify today. I would be pleased to answer any questions you may have.

Thank you.

Senator McCONNELL. Thank you, Congressman. You covered this, but I want to ask you: The bill which you introduced which subsequently passed the House would allow suits against the Federal Government under the Federal Tort Claims Act and strip away defenses normally available to the Federal Government. Congress, as

we all know, has historically enacted such legislation only under very compelling circumstances. Tell me again the rationale for your position.

Mr. BOUCHER. The rationale, Mr. Chairman, is that the contractors who conduct the atomic weapons tests historically have been indemnified by the Federal Government for any litigation costs, including not only the direct expenses of the litigation but also any settlement or judgment costs arising from that litigation.

That being the case, the contractors historically have merely been middlemen in this litigation, and it makes sense to me to remove them from the litigation altogether. Let the Federal Government be the entity that defends the suit. Let the Federal Government be the entity that ultimately has to pay both the costs of litigation and any awards either by judgment or by settlement. The contractors really have no business being involved in that particular litigation loop.

H.R. 1338 accomplishes that result. It provides a meaningful remedy by saying that the Federal Government can use only the defenses the contractor would use, and it permits the contractor to be excused from the case by directly substituting the Federal Government as the party defendant. I admit that it is an exception to the Feres doctrine. I think it is an amendment to the Federal Tort Claims Act, but one that I think under these circumstances is entirely justified.

Senator MCCONNELL. Do you fear, then, a further erosion of the Feres doctrine once you open that door?

Mr. BOUCHER. Mr. Chairman, one could never sit here and say that another amendment to the Feres doctrine to address a different pattern of circumstances would not be adopted. But I believe in being practical and I think we should judge that future case when and if it is presented, on its own merits, and I think we should judge this circumstance on its merits.

Senator MCCONNELL. If the measure you favor were to become law and the Federal Government were to face trials with the only defenses available those available to contractors, could you support legislation such as S. 2441 which I introduced on behalf of the administration, the Government Contractor Liability Reform Act, which in effect place some limitations on civil liability?

Mr. BOUCHER. Mr. Chairman, not being fully familiar with the proposal that you placed forward, I would refrain from commenting on it at this time.

Senator MCCONNELL. Well, just let me say that philosophically what we are talking about here is putting some caps on amounts that can be recovered. How do you react to that in general?

Mr. BOUCHER. Well, Mr. Chairman, as a practical matter, I think I would have to review the legislation before commenting on that. I will say, if you are looking just for a response in terms of theory, that generally I prefer leaving to the States the determination of what is an appropriate level of award in general tort matters.

With regard to the Federal Tort Claims Act, obviously we have jurisdiction to make those determinations, and I would certainly listen very attentively to any arguments you wanted to make in behalf of imposing a limit.

Senator MCCONNELL. You handled that very skillfully, Congressman.

Mr. BOUCHER. Thank you. [Laughter.]

Senator MCCONNELL. All right. I see that my colleague, the distinguished senior Senator from New Mexico has arrived and, Senator Domenici, we will be glad to hear from you at this point.

STATEMENT OF HON. PETE DOMENICI, A U.S. SENATOR FROM THE STATE OF NEW MEXICO

Senator DOMENICI. Thank you very much, Mr. Chairman.

Mr. Chairman, let me first say that I am not an expert on the Federal Tort Claims Act or the Feres doctrine that has been alluded to by the Representative that deals with claims that military personnel may have for injuries sustained while they were in the military, but obviously both of these are of tremendous import to this issue.

Right at the offset, I only urge that whatever is done here, that the Federal Tort Claims Act and the Feres doctrine be looked at from the standpoint of history and what they have and have not done.

Mr. Chairman, I did not know you were going to be presiding, but I'm glad you are. Having discussed with you only recently the current trend in the United States to litigate everything, I am aware of the bills that you have introduced with reference to trying to put some kind of sanity in our legal system. As you have indicated in many statements on the floor on bills that you have introduced, the serious question of whether the current tort system as it is being used in the courts of America is for the benefit of the plaintiff or for the benefit of the lawyers needs to be addressed. We must compare the benefit to society from all of this litigation with the enormous negatives that are occurring, such as the lack of the availability of liability insurance, even for some entity as innocent as a small school board.

I am delighted that you are chairing this morning because I do believe this committee has a very serious responsibility here. I hope when the committee solves this problem that it does not solve it in the name of the lawyers of America. Don't let all of these claimants, be they military or otherwise, think they are going to come out ahead after that bill they have been promoting goes off to the President to be signed. Don't let them be misled into walking down the street thinking they are going to get something, because these bills won't necessarily lead to that result.

So I do urge that this is a very, very serious matter and I do not think we ought to deceive anyone. I do not think we ought to create some new cause of action here and say to a group of deserving Americans that we have taken care of them because one of them might succeed in 16 years, after they have gone through three different courts and perhaps two rehearings before trial courts, and obtain a judgment. I think we ought to decide if we really want to help them because of these kinds of injuries. If they do not now have a remedy, we ought to decide what the remedy ought to be and we ought to give them a remedy that has a chance of them getting compensated, rather than the kind of solution con-

tained in these two bills, which I believe would cause nothing but havoc.

Having said that, let me make it clear that if we want to compensate the atomic veterans, let us decide that we are going to help them and let us quit fooling ourselves. The Federal Government owes them money, not Sandia Laboratories in Albuquerque, NM, or Lawrence Livermore Lab. Let us just face up to it and set up some system that is adequate to give them compensation. Let's look at the veterans laws. If they are not adequate for this kind of an injury, let's change them.

Now, let me just speak to the labs. I have a detailed statement analyzing this and I would like it made part of the record.

Senator MCCONNELL. It will be made part of the record.

Senator DOMENICI. Now let me talk about the national labs. First, I am going to tell this committee—and I do not mean this to you, Mr. Chairman, but to the extent that I am here, neither of these two bills are going to pass the Senate this year, so you all can work as much as you want on them but until we solve a couple of these problems and understand the issue, we are not going to pass them. This is not a big wheel talking. That is just a fact. There are only 30 or 40 legislative days left and that is sort of a prerogative Senators, have. I have never used it in 14 years but I choose to tell you about it today because I am prepared to use it in this case.

Let me tell you: Here you have got a laboratory—I will just pick one Sandia Laboratories—literally, absolutely nonprofit. Bell Laboratories told the Federal Government, we will run this lab for you. We will not make one penny of profit, but we will make it run like Bell Labs so you will have the premier engineering institution for nuclear weapons safety in all the world.

There is a little dotted line up to Ma Bell which says we will furnish you the management expertise, that is all, nothing else. But corporatewise they sit out here as a subsidiary. Now, do you think they are going to want to run Sandia Laboratories if we say let us get rid of the Warner amendment and let us let them all sue Sandia Laboratories, but do not worry, Sandia, if anything happens, oh, Uncle Sam sits around here ready to indemnify you. Now, you may have 200 lawsuits costing $30 million a year, but do not worry about it. We may in your annual budgets, if you do not get cut too much up here, we may get you that $30 million as you proceed through each year defending them, but you just bail us out for a while because we do not really want to face up to this, we want to let them sue you, but we are telling you ultimately you do not have to pay.

Well, what kind of monkey business is that? I mean if the Federal Government is liable, then let us let the Federal Government get sued and let us answer all the problems associated with that, but let us answer them.

I can tell you that our national laboratories do not deserve another burden like this. I have another lab in my State and they are under enormous criticism because they had to spend some money to defend civil rights suits and it is headlines all over the State that they used DOE money to litigate civil rights suits and settle them.

Well, what are they supposed to do? Maybe they did not handle them right, but we said to them hire lawyers and pay them and the Federal Government is going to indemnify you. Do you know who operates that lab? Is it a very, very profitable organization? No, it's the University of California. I think they still qualify as a nonprofit entity. They literally write the paychecks at that lab. If you work there, you get a check from the University of California.

So it seems to me we ought to solve the problem of what we want to do, what form of compensation we want to create. If we truly want to give a remedy then let us give it and let us define it and let us not kid ourselves or kid the veterans. If we were to give the veterans this kind of cause of action, Mr. Chairman, do you know how tough it would be to prove in the courts of this land under existing tort law?

It is almost impossible, yet somebody is saying give the atomic veterans this right and you will have given them some kind of justice. I say we ought to give them some compensation if that is what they are interested in, but let's define it in a way that is reasonable and do not shift the responsibility around in order to find some way for them to leave the halls of Congress thinking they really got something.

What do you think they will have when we are finished with this? From my standpoint, it just does not appear that either of these bills will solve the problem.

I close by saying let us try to find the solution. Let us find one that will work and not one that makes it appear that we are giving the atomic veterans a remedy, only to force them to wait around 8 or 10 years and see if there are any successful claimants and in the meantime the Federal Government will be paying lawyer fees to the labs and the other contractors for defending the suits. That is what these bills will surely do. I am a lawyer and I have nothing against lawyers. When I was practicing, a good plaintiff's case was heaven, you know, but I did not get too many of them. In fact, I think——

Senator MCCONNELL. You got out too soon.

Senator DOMENICI. That is right. [Laughter.]

Senator MCCONNELL. They are doing much better these days since you and I went into politics.

Senator DOMENICI. I would say, Mr. Chairman, that I probably came to the Senate because I won a plaintiff's case. It was a very handsome recovery. I had an awful lot of bills because I had been a mayor of a city and did not get a salary and I already had six children. I was not going to have enough money to run, but I convinced a jury to give somebody some money and I paid my bills and got talked into running for this job. And here I am.

I thank you very much.

[The prepared statement of Senator Domenici follows:]

STATEMENT OF
SENATOR PETE V. DOMENICI
BEFORE THE COMMITTEE ON THE JUDICIARY
REGARDING H.R. 1338 AND S. 2454

JUNE 27, 1986

MR. CHAIRMAN,

I APPRECIATE BEING ABLE TO ADDRESS THE COMMITTEE ON H.R. 1338 AND S. 2454. THESE MEASURES WOULD PERMIT INDIVIDUALS WHO WERE EXPOSED TO RADIATION AS A RESULT OF GOVERNMENT NUCLEAR WEAPONS TESTING, AND WHO HAVE SUBSEQUENTLY BECOME AFFLICTED WITH ILLNESSES THAT CAN BE TRACED TO THAT EXPOSURE, TO MAINTAIN LAWSUITS AGAINST THE FEDERAL GOVERNMENT OR GOVERNMENT CONTRACTORS FOR THESE INJURIES. I COME HERE TO REGISTER MY STRONG OPPOSITION TO THESE MEASURES.

BEFORE EXPLAINING THE BASIS OF MY OPPOSITION, LET ME STATE THAT I AM CONVINCED THAT THE FEDERAL GOVERNMENT HAS AN OBLIGATION TO COMPENSATE INDIVIDUALS WHO SUFFERED INJURIES AS A RESULT OF THEIR PARTICIPATION IN THE NUCLEAR TESTING PROGRAM. I AM SURE THAT EVERY MEMBER OF THIS COMMITTEE AGREES WITH ME ON THAT POINT. THEREFORE, ALTHOUGH THIS HAS BEEN REFERRED TO AS A HEARING TO EXAMINE GOVERNMENT LIABILITY FOR THE ATOMIC WEAPONS TESTING PROGRAM, WHAT WE ARE REALLY TALKING ABOUT HERE IS WHAT IS THE BEST WAY TO COMPENSATE INDIVIDUALS FOR RADIATION EXPOSURE.

BETWEEN 1945 AND 1963, THE UNITED STATES GOVERNMENT CONDUCTED APPROXIMATELY 235 ATMOSPHERIC TESTS OF NUCLEAR WEAPONS. AN ESTIMATED 220,000 MILITARY PERSONNEL AND 150,000 CIVILIANS TOOK PART IN THIS TESTING AND MAY HAVE BEEN EXPOSED TO LOW-LEVEL IONIZING RADIATION. THE PARTICIPANTS IN THESE TESTS HAVE COMPLAINED OF A VARIETY OF ILLNESSES, INCLUDING CANCER AND BIRTH DEFECTS IN THEIR CHILDREN, WHICH THEY ATTRIBUTE TO RADIATION EXPOSURE. AS A RESULT, A MULTITUDE OF LAWSUITS WERE FILED AGAINST THE GOVERNMENT CONTRACTORS WHO ASSISTED THE FEDERAL GOVERNMENT IN CARRYING OUT ITS NUCLEAR WEAPONS TESTING PROGRAM.

THE COMMITTEE MUST DECIDE WHETHER IT IS FAIRER TO THESE INDIVIDUALS TO ALLOW THEM TO SUE THE FEDERAL GOVERNMENT AND THE GOVERNMENT CONTRACTORS WHO PARTICIPATED IN THE NUCLEAR WEAPONS

TESTING PROGRAM IN THE HOPE, HOWEVER REMOTE, COSTLY, AND TIME-CONSUMING, THAT THEY MAY BE ABLE TO RECOVER A JUDGMENT AGAINST THEM, OR WHETHER IT IS BETTER TO PROVIDE A PREDICTABLE, EFFICIENT, SYSTEMATIC PROGRAM FOR EVALUATING CLAIMS AND PROVIDING COMPENSATION. I BELIEVE CONGRESS SHOULD ADOPT THE LATTER APPROACH IF OUR PURPOSE IS TO COMPENSATE PERSONS WHO HAVE BEEN EXPOSED TO NUCLEAR TESTING.

THE WARNER AMENDMENT

H.R. 1338 AND S. 2454 SEEK TO ALLOW INDIVIDUALS SUBJECTED TO RADIATION FROM THE NUCLEAR TESTING PROGRAM TO SUE TO RECOVER DAMAGES FOR INJURIES INCURRED AS A RESULT OF THOSE TESTS. THE EFFECT OF THESE BILLS IS TO OVERCOME THE OBSTACLES TO SUCH LAWSUITS WHICH RESULTS FROM THE "WARNER AMENDMENT," WHICH WAS ENACTED AS SECTION 1631 OF THE "OMNIBUS DEFENSE AUTHORIZATION ACT OF 1985" (P.L. 98-525) AND HAS BEEN CODIFIED AT 42 U.S.C. SEC. 2212 (SUPP. II 1986). THE WARNER AMENDMENT SUBSTITUTES THE UNITED STATES AS THE PROPER DEFENDANT IN THE PLACE OF GOVERNMENT CONTRACTORS IN LAWSUITS FOR INJURIES ALLEGEDLY CAUSED BY THE UNITED STATES' NUCLEAR TESTING PROGRAM. IT ALSO ESTABLISHES THE "FEDERAL TORT CLAIMS ACT," 28 U.S.C. SECS. 2671-2680 (1982), AS THE EXCLUSIVE REMEDY FOR SUCH CLAIMS. IT STATES THAT THE EMPLOYEES OF THE GOVERNMENT CONTRACTORS ARE CONSIDERED EMPLOYEES OF THE FEDERAL GOVERNMENT FOR THE PURPOSES OF SUCH LAWSUITS. IT ALSO SUBJECTS SUCH ACTIONS TO THE DEFENSES WHICH ARE TRADITIONALLY AVAILABLE TO THE UNITED STATES.

THE ADOPTION OF THE WARNER AMENDMENT WAS NOT A DEPARTURE FROM PAST POLICY. RATHER, THE WARNER AMENDMENT SIMPLY CODIFIED THE RELATIONSHIP BETWEEN THE FEDERAL GOVERNMENT AND THE NATIONAL LABORATORIES. SINCE THE ADVENT OF THE NUCLEAR WEAPONS TESTING PROGRAM, ALL PARTIES HAVE UNDERSTOOD THAT THE NATIONAL LABORATORIES WERE ACTING ON BEHALF OF AND IN THE PLACE OF THE FEDERAL GOVERNMENT IN THE CONDUCT OF THE NUCLEAR WEAPONS TESTING PROGRAM AND THAT THE RESPONSIBILITY FOR THE PROGRAM RESTED SOLELY WITH THE FEDERAL GOVERNMENT. IN RESPONSE TO A NUMBER OF LAWSUITS WHICH CHALLENGED THAT UNDERSTANDING, CONGRESS CODIFIED THE RELATIONSHIP IN THE WARNER AMENDMENT.

THE UNDERLYING POLICY RATIONALE FOR THE GOVERNMENT'S RELATIONSHIP WITH THE NATIONAL LABORATORIES AS CODIFIED IN THE WARNER AMENDMENT IS ABUNDANTLY CLEAR FROM THE COMMITTEE REPORT THAT ACCOMPANIED THE OMNIBUS DEFENSE AUTHORIZATION ACT, S. REP. NO. 500, 98TH CONG., 2D SESS. 374-77 (1984). I URGE THE MEMBERS OF THE COMMITTEE TO READ THE RELEVANT PORTIONS OF THAT REPORT IN FULL, BUT I WOULD LIKE TO SUMMARIZE CONGRESS' REASONS FOR ADOPTING THE WARNER AMENDMENT.

CONGRESS ACKNOWLEDGED THAT THE CONTRACTORS OPERATING NUCLEAR WEAPONS RESEARCH FACILITIES FOR THE FEDERAL GOVERNMENT ARE UNIQUE. THESE GOVERNMENT CONTRACTORS ARE BASICALLY THE NATIONAL LABORATORIES: LOS ALAMOS NATIONAL LABORATORY AND LAWRENCE LIVERMORE NATIONAL LABORATORY, WHICH ARE OPERATED BY THE UNIVERSITY OF CALIFORNIA, AND SANDIA NATIONAL LABORATORIES, WHICH ARE OPERATED BY AT&T. THEY CONDUCT RESEARCH, DEVELOPMENT, AND TESTING ON NUCLEAR WEAPONS FOR THE FEDERAL GOVERNMENT AS A PUBLIC SERVICE AND ARE OPERATED ON A NON-PROFIT BASIS.

THE NATIONAL LABORATORIES DO NOT SET POLICY OR MAKE THE DECISIONS WHICH IMPLEMENT THOSE DECISIONS. AS TH COMMITTEE REPORT STATED, "[O]NLY THE [FEDERAL] GOVERNMENT SETS THE POLICY, MAKES THE DECISIONS, AND CONTROLS ACTIVITIES AND CIRCUMSTANCES REGARDING ATOMIC WEAPON RESEARCH, DEVELOPMENT, AND TESTING. CONSEQUENTLY, THESE CONTRACTORS WERE UTILIZED BY THE UNITED STATES AS INSTRUMENTS OF NATIONAL POLICY TO ASSIST IN THIS ENTIRELY GOVERNMENTAL TASK [I.E., NUCLEAR WEAPONS RESEARCH, DEVELOPMENT, AND TESTING]." THE NATIONAL LABORATORIES WERE AND ARE STILLED OPERATED BY NON-FEDERAL ORGANIZATIONS, BUT THESE LABORATORIES ARE OWNED, DIRECTED, AND CONTROLLED BY THE FEDERAL GOVERNMENT.

THE COMMITTEE REPORT NOTED THAT CONGRESS HAS ESTABLISHED A COMPREHENSIVE SCHEME OF FEDERAL CONTROL OF THE NUCLEAR WEAPONS PROGRAM AND CONCLUDED:

> EACH NUCLEAR TEST THAT HAS BEEN MADE SINCE 1946 HAS BEEN MADE UNDER THE STATUTORY DIRECTION OF CONGRESS. EACH NUCLEAR TEST HAS BEEN APPROVED, BEFORE THE FACT, BY THE PRESIDENT OF THE UNITED STATES. EACH NUCLEAR TEST HAS BEEN UNDER THE DIRECT SUPERVISION OF GOVERNMENT OFFICIALS. EACH NUCLEAR TEST HAS BEEN PARTICIPATED IN BY HUNDREDS, AND IN SOME CASES THOUSANDS, OF GOVERNMENT OFFICIALS AND MILITARY AND CIVILIAN PERSONNEL.

> THE COMMITTEE RECOGNIZES, AS HAS THE CONGRESS, THAT THE MILITARY APPLICATIONS OF ATOMIC ENERGY COULD NOT PROCEED EITHER TECHNICALLY OR ECONOMICALLY WITHOUT THE PARTICIPATION OF ORGANIZATIONS THAT POSSESS BOTH SCIENTIFIC MANAGEMENT SKILLS AND A HIGH DEGREE OF SCIENTIFIC AND TECHNICAL EXPERTISE. SEVERAL SUCH ORGANIZATIONS WERE PLACED UNDER CONTRACT ALMOST AT THE INCEPTION OF THE NUCLEAR WEAPONS PROGRAM IN 1942 AND HAVE PERFORMED IN AN OUTSTANDING MANNER IN THE NATIONAL INTEREST FOR MORE THAN THREE DECADES. THESE ORGANIZATIONS HAVE PROVIDED SCIENTIFIC, ENGINEERING AND TECHNICAL SUPPORT FOR NUCLEAR TESTS CARRIED OUT BY THE GOVERNMENT AND FOR THE GOVERNMENT IN THE EXERCISE OF A GOVERNMENTAL FUNCTION, I.E., PROVIDING FOR THE NATIONAL DEFENSE. THESE ORGANIZATIONS DID NOT ORDER THE TESTS TO BE PERFORMED; THEY DID NOT SET THE TIMES OR PLACES FOR THE TESTS; NOR DID THEY DIRECT MILITARY OR CIVILIAN GOVERNMENT PERSONNEL TO PARTICIPATE IN THEM. IT SHOULD APPEAR, WITHOUT QUESTION, THAT THESE CONTRACTORS WERE ACTING AS THE DE FACTO INSTRUMENTS OF THE UNITED STATES GOVERNMENT IN CARRYING OUT A GOVERNMENTAL PURPOSE.
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> ....
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> [T]HE COMMITTEE DOES NOT BELIEVE THAT ANY CONTRACTOR SHOULD BE USED AS AN INSTRUMENTALITY OF THE GOVERNMENT AND THEN ABANDONED WHEN INUNDATED BY A FLOOD OF LITIGATION ARISING FROM THAT SAME GOVERNMENT ACTIVITY.

SIMILAR RATIONALES WERE EXPRESSED IN THE HOUSE REPORT WHICH ACCOMPANIED THE "DEPARTMENT OF ENERGY NATIONAL SECURITY AND MILITARY APPLICATIONS OF NUCLEAR AUTHORIZATIONS ACT OF 1984," H.R. 2797, WHICH CONTAINED A SIMILAR PROVISION. SEE H. RPT. NO. 124, PT. 1, 98TH CONG. 1ST SESS. 27-30 (1983).

THE BILLS BEFORE THIS COMMITTEE WOULD ABANDON THE LONG-STANDING AND WELL-FOUNDED POLICY OF CONGRESS. WHILE THIS WOULD BE A MISTAKE IN ANY CIRCUMSTANCE, IT IS A PARTICULARLY MISGUIDED BECAUSE NEITHER BILL WOULD ACCOMPLISH THE GOAL OF ASSURING THAT INJURED VETERANS ARE COMPENSATED.

IT HAS BEEN ASSERTED THAT THE WARNER AMENDMENT DEPRIVES SOME INDIVIDUALS OF THEIR "RIGHT" TO SUE FOR THEIR RADIATION-RELATED INJURIES. THE COURTS WHICH HAVE EXAMINED THIS ISSUE, HOWEVER, HAVE FOUND THE WARNER AMENDMENT TO BE A PROPER AND CONSTITUTIONAL EXERCISE OF CONGRESSIONAL POWER. SEE HAMMOND V. UNITED STATES, 786 F.2D 8 (1ST CIR. 1986); IN RE CONSOLIDATED UNITED STATES ATMOSPHERIC TESTING LITIGATION, 616 F. SUPP. 759 (N.D. CAL. 1985). AS ONE COURT NOTED, PRIOR TO THE WARNER AMENDMENT "[P]LAINTIFFS HAD THE BEST OF BOTH POSSIBLE WORLDS, A RIGHT TO SUE FREE OF ANY [FEDERAL TORT CLAIMS ACT] LIMITATIONS WITH THE GOVERNMENT GUARANTEEING PAYMENT OF THE JUDGMENT." HAMMOND, 786 F.2D AT 14.

FURTHERMORE, LEGISLATION SIMILAR TO THE WARNER AMENDMENT IS

NOT UNIQUE IN OUR LEGISLATIVE ANNALS. IN A NUMBER OF OTHER ACTS, SPECIFICALLY IN REGARD TO PUBLIC HEALTH SERVICE MEDICAL PERSONNEL, 42 U.S.C. SEC. 233 (1982), VETERANS' ADMINISTRATION MEDICAL PERSONNEL, 38 U.S.C. SEC. 4116 (1982), ARMED FORCES MEDICAL PERSONNEL, 10 U.S.C. SEC. 1089(A) (SUPP. II 1984), AND THE FEDERAL DRIVERS ACT, 28 U.S.C. SEC. 2679 (1982), CONGRESS SUBSTITUTED THE FEDERAL TORT CLAIMS ACT REMEDY AGAINST THE GOVERNMENT FOR REMEDIES AVAILABLE AGAINST PRIVATE PARTIES, AND THESE ACTS HAVE BEEN UNIFORMLY UPHELD. SEE IN RE CONSOLIDATED UNITED STATES ATMOSPHERIC TESTING LITIGATION, 616 F. SUPP. AT 766.

S. 2454

S. 2454 WOULD REPEAL THE WARNER AMENDMENT OUTRIGHT AND RETURN TO THE PROCEDURE THAT WAS IN PLACE PRIOR TO 1984. UNDER THAT PROCEDURE, SUITS COULD BE BROUGHT AGAINST GOVERNMENT CONTRACTORS WHO PARTICIPATED IN THE NUCLEAR TESTING PROGRAM FOR INJURIES RELATED TO THAT PROGRAM. THE GOVERNMENT CONTRACTORS WERE INDEMNIFIED BY THE FEDERAL GOVERNMENT FOR ALL COSTS OF LITIGATION, JUDGMENTS, AND SETTLEMENTS.

SOME BELIEVE THAT THIS PROCEDURE ADEQUATELY PROTECTS THE INTERESTS OF THE GOVERNMENT CONTRACTORS. THESE OBSERVERS, HOWEVER, OVERLOOK THE FACT THAT THESE LAWSUITS DIVERT HUMAN AND FINANCIAL RESOURCES AWAY FROM THE NATIONAL LABORATORIES' MISSION AND INTO LITIGATION. THIS DISRUPTS THE VITAL NATIONAL SECURITY WORK WHICH IS CONDUCTED AT THE NATIONAL LABORATORIES. MUCH OF THE EVIDENCE RELEVANT TO THE ISSUES IN THESE SUITS ARE CLASSIFIED AND NOT AVAILABLE FOR THE NATIONAL LABORATORIES TO USE IN DEFENDING THEMSELVES.

MOST IMPORTANTLY, HOWEVER, THE DEBATE OVER WHETHER THE INTERESTS OF THE GOVERNMENT CONTRACTORS WOULD BE ADEQUATELY PROTECTED IN THE EVENT OF THE REPEAL OF THE WARNER AMENDMENT IGNORES THE ESSENTIAL POINT -- THAT IS, THAT THE UNITED STATES GOVERNMENT WAS EXCLUSIVELY RESPONSIBLE FOR THE NUCLEAR WEAPONS TESTING PROGRAM. IT IS SIMPLY UNFAIR AND UNCONSCIONABLE FOR THE UNITED STATES GOVERNMENT TO ALLOW THE NATIONAL LABORATORIES WHICH ASSISTED IT IN CARRYING OUT THIS PROGRAM TO BE HELD RESPONSIBLE

FOR THE CONSEQUENCES OF THE GOVERNMENT'S POLICIES, DECISIONS, AND ACTIONS.

IF IT IS THE BELIEF OF THE PROPONENTS OF S. 2454 THAT THE MEASURE WOULD NOT HOLD THE NATIONAL LABORATORIES RESPONSIBLE FOR THE NUCLEAR TESTING PROGRAM, SINCE THE NATIONAL LABORATORIES ARE INDEMNIFIED, THEN S. 2454 IS EXPOSED AS A MERE MECHANISM FOR RECOVERING JUDGMENTS FROM THE FEDERAL GOVERNMENT IN AN AREA WHERE INJURED PARTIES CANNOT OTHERWISE RECOVER FROM THE GOVERNMENT. UNDER EXISTING LAW, THOSE PERSONS INJURED AS A RESULT OF THEIR PARTICIPATION IN THE NUCLEAR WEAPONS TESTING PROGRAM CANNOT RECOVER DIRECTLY FROM THE FEDERAL GOVERNMENT BECAUSE OF THE FERES DOCTRINE,[1] THE DISCRETIONARY FUNCTION EXCEPTION,[2] THE FOREIGN COUNTRY EXCEPTION,[3] AND/OR THE COMBATANT ACTIVITIES EXCEPTION.[4] S. 2454 WOULD ALLOW PERSONS INJURED BY THE NUCLEAR WEAPONS TESTING PROGRAM TO SUE THE FEDERAL GOVERNMENT FOR INJURIES ARISING OUT OF THOSE TESTS BY FOSTERING THE ILLUSION THAT THE NATIONAL LABORATORIES WERE RESPONSIBLE FOR THE NUCLEAR WEAPONS TESTING PROGRAM.

THE EFFECT OF S. 2454 IS TO SUBJECT THE NATIONAL LABORATORIES TO A MULTITUDE OF LAWSUITS REGARDING INJURIES FOR WHICH THE FEDERAL GOVERNMENT, AND NOT THE NATIONAL LABORATORIES, IS SOLELY RESPONSIBLE. ALTERNATIVELY, THE EFFECT OF S. 2454 IS TO PERMIT LITIGANTS TO USE THE LEGAL STATUS OF THE NATIONAL LABORATORIES IN ORDER TO CIRCUMVENT THE OBSTACLES WHICH PROHIBIT DIRECT RECOVERY FROM THE FEDERAL GOVERNMENT. IN EITHER CASE, THE CONGRESS SHOULD NOT ENACT A MEASURE THAT HAS SUCH AN EFFECT.

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1. THE FERES DOCTRINE HOLDS THAT THE FEDERAL TORT CLAIMS ACT DOES NOT EXTEND TO INJURIES TO SERVICEMEN WHERE THE INJURIES WERE SUSTAINED IN THE COURSE OF MILITARY SERVICE. SEE FERES V. UNITED STATES, 340 U.S. 135 (1950).
2. THE DISCRETIONARY FUNCTION EXCEPTION EXCLUDES RECOVERY UNDER THE FEDERAL TORT CLAIMS ACT FOR ANY CLAIM ARISING OUT OF "THE EXERCISE OR PERFORMANCE OR THE FAILURE TO EXERCISE OR PERFORM A DISCRETIONARY FUNCTION OR DUTY ON THE PART OF A FEDERAL AGENCY OR AN EMPLOYEE OF THE GOVERNMENT, WHETHER OR NOT THE DISCRETION INVOLVED IS ABUSED." 28 U.S.C. SEC. 2680(A) (1982).
3. THE FOREIGN COUNTRY EXCEPTION EXCLUDES ANY CLAIM ARISING IN A FOREIGN COUNTRY FROM THE COVERAGE OF THE FEDERAL TORT CLAIMS ACT. 28 U.S.C. SEC. 2680(K) (1982).
4. THE COMBATANT ACTIVITIES EXCEPTION EXCLUDES FROM THE COVERAGE OF THE FEDERAL TORT CLAIMS ACT ANY CLAIM ARISING OUT OF THE COMBAT ACTIVITIES OF THE MILITARY DURING A TIME OF WAR. 28 U.S.C. SEC. 2680(J) (1982).

H.R. 1338

H.R. 1338 WOULD AMEND THE FEDERAL TORT CLAIMS ACT TO ALLOW SUITS AGAINST THE UNITED STATES FOR MONEY DAMAGES TO COMPENSATE FOR INJURY, LOSS OF PROPERTY, OR DEATH DUE TO EXPOSURE TO RADIATION RESULTING FROM THE ATOMIC WEAPONS TESTING PROGRAM. THE BILL ALSO PROVIDES THAT THE UNITED STATES SHALL BE SUBSTITUTED AS THE DEFENDANT FOR THE GOVERNMENT CONTRACTORS IN ANY ACTION BROUGHT AGAINST THE CONTRACTORS FOR THEIR PARTICIPATION IN THE WEAPONS TESTING PROGRAM. IN EITHER CASE, THE FEDERAL GOVERNMENT IS LIABLE TO THE EXTENT THAT THE GOVERNMENT CONTRACTOR WOULD BE LIABLE AND IS AFFORDED ONLY THOSE DEFENSES THAT WOULD BE AVAILABLE TO THE GOVERNMENT CONTRACTOR.

THE EFFECT OF H.R. 1338 IS TO SUPERCEDE THE WARNER AMENDMENT AND PERMIT INJURED PARTIES TO MAINTAIN LAWSUITS AGAINST THE FEDERAL GOVERNMENT FOR THEIR RADIATION-RELATED INJURIES. IN ORDER TO ELIMINATE THE OBSTACLES TO SUCH SUITS, THE BILL WOULD CREATE EXEMPTIONS TO THE FERES DOCTRINE, THE DISCRETIONARY FUNCTION EXCEPTION, THE FOREIGN COUNTRY EXCEPTION, AND THE COMBATANT ACTIVITIES EXCEPTION FOR CLAIMS ARISING FROM THE CONDUCT OF THE ATOMIC WEAPONS TESTING PROGRAM. THE RESULT OF H.R. 1338 IS THE ESTABLISHMENT OF A MECHANISM FOR PERMITTING PLAINTIFFS TO OBTAIN A RECOVERY FROM THE GOVERNMENT WHERE THEY OTHERWISE COULD NOT. H.R. 1338 WOULD PLACE THE UNITED STATES IN THE POSITION OF ANY OTHER ALLEGED TORTFEASOR. SUCH A RESULT IS IMPROPER IN THIS CASE BECAUSE THESE CLAIMS ARISE OUT OF CIRCUMSTANCES AND ACTIVITIES PECULIAR AND UNIQUE TO THE GOVERNMENT AS SOVEREIGN. THEY ARE THE PRODUCT OF ACTS AND DECISIONS BY THE GOVERNMENT UNDERTAKEN FOR PURELY GOVERNMENTAL PURPOSES. THEY CAN IN NO WAY BE EQUATED WITH THE CLAIM OF AN INJURED PERSON AGAINST A PRIVATE TORTFEASOR. A WAIVER OF THE GOVERNMENT'S TRADITIONAL DEFENSES TO SUCH ACTIONS IS THEREFORE UNWARRANTED.

I AM CONCERNED THAT, IN ENACTING EITHER OF THESE MEASURES, CONGRESS WOULD BE SINGLING OUT ONE GROUP OF DESERVING CLAIMANTS FOR SPECIAL TREATMENT. IF CONGRESS IS TO ALLOW THOSE WITH RADIATION-RELATED INJURIES TO SUE THE FEDERAL GOVERNMENT, WHY DO WE NOT ALSO ALLOW OTHER DESERVING CLAIMANTS, SUCH AS THOSE WHO SUFFER FROM EFFECTS OF AGENT ORANGE OR THE RELATIVES OF THE

SERVICEMEN KILLED IN THE AIRPLANE CRASH IN GANDER, NEWFOUNDLAND LAST DECEMBER, TO MAINTAIN SUITS? FURTHERMORE, ALTHOUGH I AM WARY OF "SLIPPERY SLOPE" AND "PARADE OF HORRIBLES" ARGUMENTS, I ALSO MUST POINT OUT THAT THE WAIVER OF THE TRADITIONAL DEFENSES AVAILABLE TO THE FEDERAL GOVERNMENT ESTABLISHES A PRECEDENT THAT MAY BE DIFFICULT TO DISTINQUISH WHEN OTHER, LESS DESERVING, CAUSES COME BEFORE THIS COMMITTEE. CONGRESS SHOULD BE VERY CAUTIOUS WHEN WAIVING THE DEFENSES WHICH TRADITIONALLY HAVE BEEN AVAILABLE TO THE FEDERAL GOVERNMENT.

ALTERNATIVE FORMS OF COMPENSATION

EVEN IF CONGRESS WERE TO ENACT ONE OF THE MEASURES BEFORE THIS COMMITTEE, IT IS DOUBTFUL THAT INJURED PARTIES WOULD EVER BE ABLE TO OBTAIN A JUDGMENT BASED ON A RADIATION-RELATED CLAIM. I AM AWARE OF NO JUDGMENT THAT HAS EVER BEEN ENTERED AGAINST THE GOVERNMENT CONTRACTORS FOR A CLAIM BASED ON EXPOSURE TO RADIATION WHICH RESULTED FROM THE NUCLEAR WEAPONS TESTING PROGRAM. I KNOW OF ONLY ONE SUCH JUDGMENT AGAINST THE FEDERAL GOVERNMENT FOR SUCH A CLAIM, AND THAT JUDGMENT CURRENTLY IS ON APPEAL. EVEN IF A SUCCESSFUL SUIT WERE A REALISTIC POSSIBILITY, IT IS UNFAIR TO SUBJECT DESERVING CLAIMANTS TO THE TIME-CONSUMING, EXPENSIVE, AND UNPREDICTABLE PROCESSES OF THE LEGAL SYSTEM IN ORDER TO RECOVER FOR THEIR INJURIES.

IN ESSENCE, WHEN INDIVIDUALS COMPLAIN ABOUT THE EFFECTS OF THE WARNER AMENDMENT, THEY ARE ACTUALLY COMPLAINING ABOUT THE ABSENCE OF AN ADEQUATE GOVERNMENT PROGRAM TO COMPENSATE THEM FOR THEIR RADIATION-RELATED INJURIES. IT IS TO THIS UNDERLYING CRITICISM THAT CONGRESS SHOULD ADDRESS ITSELF.

CONGRESS SHOULD ASSURE THAT THERE EXISTS WITHIN THE VETERANS ADMINISTRATION A FAIR, PREDICTABLE, EFFICIENT, AND SYSTEMATIC PROGRAM FOR COMPENSATING VETERANS WITH RADIATION-RELATED CLAIMS. CONGRESS ATTEMPTED TO DO JUST THAT WHEN IT ADOPTED THE "VETERANS' DIOXIN AND RADIATION EXPOSURE COMPENSATION STANDARDS ACT," 38 U.S.C.A. SEC. 354 NOTE, (P.L. 98-542). THE PURPOSE OF P.L. 98-542 IS TO ENSURE THAT THE VETERANS' ADMINISTRATION PROVIDES DISABILITY COMPENSATION TO VETERANS WHO ARE SUFFERING FROM RADIATION-RELATED DISABILITIES AS A RESULT OF THEIR SERVICE IN THE ARMED FORCES.

PRIOR TO THE PASSAGE OF P.L. 98-542, IT WAS CLEAR THAT VETERANS WHO FILED DISABILITY COMPENSATION CLAIMS BASED ON RADIATION EXPOSURE WERE LARGELY UNSUCCESSFUL IN ESTABLISHING A SERVICE CONNECTION FOR THEIR DISABILITIES. ACCORDING TO THE CONGRESSIONAL RESEARCH SERVICE,[5] AS OF AUGUST 1, 1984, 4,286 VETERANS HAD FILED RADIATION CLAIMS. IN 2,801 OF THESE CASES, THE VETERANS' ADMINISTRATION CONFIRMED THE EXISTENCE OF A DISABILITY. THE VETERANS' ADMINISTRATION GRANTED COMPENSATION IN ONLY 29 CASES INVOLVING ATOMIC TESTING AND 63 CASES INVOLVING EXPOSURE FROM OTHER SOURCES. IT ALLOWED NONE OF THE 609 CLAIMS BY VETERANS WHO SERVED IN THE OCCUPATION FORCES IN HIROSHIMA AND NAGASAKI. THIS LACK OF COMPENSATION LED CONGRESS TO ENACT P.L. 98-542.

P.L. 98-542 MANDATES THAT:

1. THE VETERANS' ADMINISTRATION PROMULGATE REGULATIONS ESTABLISHING THE GUIDELINES FOR THE RESOLUTION OF RADIATION-RELATED CLAIMS;
2. THE VETERANS' ADMINISTRATION DETERMINE WHETHER THERE SHOULD BE A PRESUMPTION OF SERVICE-CONNECTION FOR THE DISEASES OF LEUKEMIA AND OTHER SPECIFIED DISEASES IN THE CASE OF RADIATION EXPOSURE;
3. THE VETERANS' ADMINISTRATION DETERMINE WHETHER CLAIMANTS SHOULD BE GIVEN THE BENEFIT OF REASONABLE DOUBT IN THE DETERMINATION OF WHETHER THE INJURIES ARE SERVICE RELATED; AND
4. AN ADVISORY COMMITTEE AND A SCIENTIFIC COUNCIL ON ENVIRONMENTAL HAZARDS BE ESTABLISHED TO EVALUATE PERTINENT SCIENTIFIC FINDINGS AND TO ADVISE THE ADMINISTRATOR OF THE VETERANS' ADMINISTRATION.

THESE REGULATIONS HAVE BEEN ADOPTED AND ARE NOW IN EFFECT. SEE 50 FED. REG. 34,452 (1985) (TO BE CODIFIED AT 38 C.F.R. PTS. 1, 3).

IF THE PROVISIONS OF THE P.L. 98-542 AND ITS RELATED REGULATIONS ARE INADEQUATE, THEN CONGRESS SHOULD REVIEW THOSE PROVISIONS AND MAKE WHATEVER ADJUSTMENTS ARE NECESSARY TO ASSURE THAT THOSE WHO HAVE SUFFERED INJURIES DUE TO THEIR EXPOSURE TO

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5. B. MCCLURE, VETERANS' DISABILITY COMPENSATION FOR VETERANS EXPOSED TO AGENT ORANGE OR ATOMIC RADIATION 5 (CONGRESSIONAL RESEARCH SERVICE, OCT. 25, 1984)

RADIATION AS A RESULT OF THE NUCLEAR WEAPONS TESTING PROGRAM RECEIVE COMPENSATION. SUCH A SYSTEM OF COMPENSATION WOULD BE MORE FAIR, MORE PREDICTABLE, MORE EFFICIENT, AND MORE SYSTEMATIC THAN SUBJECTING CLAIMS TO THE VAGARIES OF THE LEGAL SYSTEM.

SIMILARLY, CONGRESS SHOULD ALSO EXAMINE THE "FEDERAL EMPLOYEES COMPENSATION ACT," 5 U.S.C. SECS. 8101-8151 (1982 AND SUPP. II 1984), TO ENSURE THAT IT IS ADEQUATE TO ADDRESS THE CLAIMS OF NON-MILITARY GOVERNMENT EMPLOYEES FOR INJURIES RESULTING FROM RADIATION EXPOSURE. IF THERE ARE OBSTACLES TO RECOVERY THROUGH THE ACT, THEN CONGRESS SHOULD MAKE WHATEVER ADJUSTMENTS ARE NECESSARY TO ASSURE THAT DESERVING CLAIMANTS ARE ADEQUATELY COMPENSATED.

CONCLUSION

IN SUM, THE WARNER AMENDMENT WAS A CODIFICATION OF THE LONG-STANDING POLICY OF THE FEDERAL GOVERNMENT TOWARDS THE NATIONAL LABORATORIES. THIS POLICY IS A EMINENTLY REASONABLE AND IS BASED ON A RECOGNITION OF THE UNIQUE SITUATION OF THE NATIONAL LABORATORIES WHO WERE ENLISTED TO ASSIST THE FEDERAL GOVERNMENT IN ITS NUCLEAR WEAPONS TESTING PROGRAM. CONGRESS SHOULD NOT ABANDON THE WARNER AMENDMENT AND THE POLICY WHICH IT EMBODIES. THE BILLS BEFORE THE COMMITTEE WOULD ABANDON THE SOUND POLICY TOWARDS GOVERNMENT CONTRACTORS WHICH CONGRESS AFFIRMED IN 1984 AND WOULD NOT ACHIEVE THE GOAL OF ASSURING THAT PERSONS SUBJECTED TO RADIATION AS A RESULT OF THEIR PARTICIPATION IN THE NUCLEAR WEAPONS TESTING PROGRAM RECEIVE THE COMPENSATION THAT THEY DESERVE. THE WAY TO GUARANTEE THAT THESE INDIVIDUALS RECEIVE THE COMPENSATION TO WHICH THEY ARE ENTITLED IS TO ASSURE THAT A FAIR, PREDICTABLE, EFFICIENT, AND SYSTEMATIC PROGRAM FOR COMPENSATION EXISTS. TO THE EXTENT THAT DESERVING INDIVIDUALS CURRENTLY ARE NOT BEING COMPENSATED, CONGRESS SHOULD EXAMINE THE EXISTING PROGRAMS AND MAKE THE ADJUSTMENTS NECESSARY TO CORRECT THEIR DEFICIENCIES.

THANK YOU, MR. CHAIRMAN.

Senator MCCONNELL. Thank you very much, Senator Domenici and Congressman Boucher. We appreciate it very much.

Mr. BOUCHER. Mr. Chairman, would you mind if I said just a couple of words in response to the Senator's comments?

Senator MCCONNELL. If you do it really briefly. We have got a long list of witnesses.

Mr. BOUCHER. I will try to be very brief. Let me make just two additional points. First of all, I am glad to hear the Senator's comment that he does not think that the national laboratories should be involved in litigation. I agree with that statement wholeheartedly, and H.R. 1338 would clearly remove the national laboratories from the litigation. I think that is an important point to note and is consistent with his comments.

Second, with regard to compensation as being an alternative to simply providing the cause of action to veterans, I would point out that legislation to provide compensation has been pending with no apparent hope of success during the current Congress. I certainly would support that. But as a measure to provide those who truly can establish their cause of action, and there will be some, with the right to do that, I would strongly hope that the committee would consider H.R. 1338.

Thank you, Mr. Chairman.

Senator MCCONNELL. Thank you, Congressman. We appreciate your comments.

Before we begin with the first panel I wish to place in the record copies of S. 2454 and H.R. 1338.

[The aforementioned follows:]

II

99TH CONGRESS
2D SESSION

S. 2454

To repeal section 1631 of the Department of Defense Authorization Act, 1985, relating to the liability of government contractors for injuries or losses of property arising out of certain atomic weapons testing programs, and for other purposes.

IN THE SENATE OF THE UNITED STATES

MAY 15 (legislative day, MAY 12), 1986

Mr. MURKOWSKI (for himself, Mr. WARNER, Mr. SIMON, Mr. CRANSTON, Mr. DECONCINI, and Mr. DENTON) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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A BILL

To repeal section 1631 of the Department of Defense Authorization Act, 1985, relating to the liability of government contractors for injuries or losses of property arising out of certain atomic weapons testing programs, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) section 1631 of the Department of Defense Authorization Act, 1985 (Public Law 98–525; 98 Stat. 2646) is repealed effective on October 19, 1984.

(b) The period during which section 1631 of the Department of Defense Authorization Act, 1985, was in effect shall

not be taken into account in computing the period provided in any Federal or State statute of limitations applicable to any civil action for an injury, loss of property, personal injury, or death described in subsection (a)(1) of such section.

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II

99TH CONGRESS
2D SESSION

H. R. 1338

IN THE SENATE OF THE UNITED STATES

MAY 14 (legislative day, MAY 12), 1986

Received; read twice and referred to the Committee on the Judiciary

AN ACT

To amend title 28, United States Code, to allow suits against the United States for acts or omissions of contractors in carrying out the atomic weapons testing program, and to substitute the United States as the party defendant in suits brought against such contractors.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) chapter 171 of title 28, United States Code, is amended by adding at the end thereof the following new section:

"§ 2681. Certain civil actions involving the atomic weapons testing program

"(a)(1) Notwithstanding any other provision of this chapter, or section 2401 of this title, an action may be brought against the United States for money damages for injury to or loss of property or for personal injury or death due to exposure to radiation based on an act or omission of a contractor in carrying out an atomic weapons testing program under a contract with the United States. In any such action, the United States shall be liable to the same extent as the contractor would be liable, and shall have available as defenses only those defenses that would be available to the contractor.

"(2) Notwithstanding any other provision of this chapter, or section 2401 of this title, in any action brought against any person other than the United States for money damages for injury to or loss of property or for personal injury or death due to exposure to radiation based on an act or omission of a contractor in carrying out an atomic weapons testing program under a contract with the United States, the United States shall be substituted as the party defendant and shall have available as defenses only those defenses available to the contractor.

"(3) For purposes of any action described in paragraph (1) or (2), the contractor shall not be considered to be a cor-

poration primarily acting as an instrumentality or agency of the United States.

"(4) Any action described in paragraph (1) or (2) shall, at the request of any party to the action, be tried by the court with a jury.

"(b) A contractor against whom an action described in subsection (a)(2) is brought shall promptly deliver all process served upon that contractor to the Attorney General. Upon certification by the Attorney General that the suit against the contractor is within the provisions of subsection (a)(2) of this section, an action commenced in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place in which the action is pending. For purposes of such removal, the certification by the Attorney General under this subsection establishes conclusively that the action is within the provisions of subsection (a)(2) of this section.

"(c) In any action under subsection (a), the United States shall not be liable for interest prior to judgment or for punitive damages.

"(d) The judgment in an action under subsection (a) shall constitute a complete bar to any other civil action by the plaintiff, by reason of the same subject matter, against

the contractor whose act or omission gave rise to the claim, or against any employee or agent of the contractor.

"(e) The Attorney General or a person designated by the Attorney General may arbitrate, compromise, or settle any action under subsection (a).

"(f)(1) No attorney may charge, demand, receive, or collect for services rendered, fees in excess of 25 percent of any judgment rendered, or any compromise or settlement made, in an action under subection (a).

"(2) Any attorney who violates paragraph (1) shall, if recovery be had, be fined not more than $2,000 or imprisoned not more than one year, or both.

"(g) This section applies to actions pending on October 19, 1984, and to actions commenced after that date.

"(h) For purposes of this section, the term 'contractor' includes a contractor, or cost reimbursement subcontractor of any tier, participating in the conduct of the United States atomic weapons testing program for the Department of Energy (or any of its predecessor agencies, including the Manhattan Engineer District, the Atomic Energy Commission, and the Energy Research and Development Administration). Such term also includes facilities which conduct or have conducted research concerning health effects of ionizing radiation in connection with the testing under contract with

the Department of Energy (or any of its predecessor agencies).".

(b) The table of sections at the beginning of chapter 171 of title 28, United States Code, is amended by adding at the end thereof the following:

"2681. Certain civil actions involving the atomic weapons testing program.".

SEC. 2. Section 1346 of title 28, United States Code, is amended by adding at the end thereof the following new subsection:

"(g) The district courts shall have exclusive jurisdiction of all actions under section 2681 of this title.".

Passed the House of Representatives May 13, 1986.

Attest: BENJAMIN J. GUTHRIE,

Clerk.

Senator MCCONNELL. Now I would like to call Richard Willard, Assistant Attorney General for the Civil Division, and Don Ofte, Principal Deputy Assistant Secretary for Defense Programs at the Department of Energy.

Gentlemen, if you would give us brief statements, we will insert the full text of your remarks in the record.

Mr. Willard.

PANEL CONSISTING OF RICHARD K. WILLARD, ASSISTANT ATTORNEY GENERAL, CIVIL DIVISION, DEPARTMENT OF JUSTICE; AND DON OFTE, PRINCIPAL DEPUTY ASSISTANT SECRETARY FOR DEFENSE PROGRAMS, DEPARTMENT OF ENERGY

Mr. WILLARD. Thank you, Mr. Chairman. And since my full statement is being submitted for the record, I would just like to emphasize four points briefly today.

First of all, I agree completely with Senator Domenici—and I think that later witnesses will testify—that if there is a complaint here about anyone doing anything wrong, it should be directed to the Federal Government and not contractors. Contractors simply facilitate the carrying out of national policy made at the very highest levels of our Government.

Our Government made a deliberate decision to develop, test and deploy nuclear weapons. This decision was made by Presidents Roosevelt and Truman at a time of grave national emergency. Our Government deliberately decided to conduct the testing in a way that could expose people to radiation. That was not a decision made by the contractors, and so if there is a complaint here about the exposure of people to radiation, it is a complaint they have against the Government.

The only reason that these veterans sued the contractors in the first place was that they could not sue the Federal Government. Because of all the jurisdictional barriers, they basically adopted a subterfuge of suing the contractors for liability where—if there were to be liability at all—it ought to be the liability of the Federal Government.

The second point I would like to make is that there are very good reasons why veterans are not allowed to sue the Government for injuries obtained in the line of duty. The well-established Feres doctrine provides that when servicemen are injured or killed in combat or in their military service, they cannot sue the Government. There is a very generous program of veterans benefits available for people who are injured in the line of duty. But as a practical matter, there would be a nightmare of litigation if every serviceman who is injured in the line of duty, or who was injured in World War II, in Korea and in Vietnam were to file a lawsuit against the Federal Government. We would have to have a doubling of the size of the Justice Department just to defend that litigation. This measure could also have a serious impact on national security.

Obviously, it is not fair that a certain group of veterans should be allowed a preferential right to litigate against the Government that is denied to thousands, even millions of other veterans who were injured in the service of their country.

In 1984, Congress did pass the Veterans Dioxin and Radiation Exposure Compensation Standards Act, which liberalizes the procedures of the Veterans' Administration to give veterans every benefit of the doubt in terms of proving injury or disability as a result of exposure to radiation. That legislative initiative, we would contend, is an appropriate response by Congress.

The third point I would like to make is that whatever compensation program you have, whether it is through litigation or through the Veterans' Administration, it still requires a showing of causation. In this case, I think many of these veterans have been cruelly misled into believing that they are suffering from the effects of radiation when in fact they are not.

At present rates, 30 percent of all living Americans are going to come down with cancer at some time in their lifetime. It is not surprising, therefore, that a large number of World War II era veterans have come down with cancer. But that does not mean their cancer was caused by radiation, because the same kind of incidence of cancer occurs among populations that are not exposed to radiation.

Studies by the Government, which are cited in my prepared testimony, have shown that approximately 99 percent of the participants in the testing program received dosages of radiation under 5 rads, which is the current occupational exposure standard and is comparable to the kind of exposure people are likely to get in a lifetime from natural sources, or medical x rays, or whatever.

The scientific evidence supports the conclusion that this kind of low level radiation exposure does not cause cancer. Obviously, high levels of radiation exposure can cause cancer, but most of the participants in the test program received very low levels of exposure which are comparable to what the population generally receives.

One might wonder, why do the plaintiffs want this legislation to be able to sue if they are not likely to be able to prove causation? Well, the fact is they want to be able to get their case before a jury because juries do wild and crazy things.

A jury in Orange County, CA, recently awarded a woman $650,000 on the theory that her breast cancer had been caused by an automobile accident. There is no scientific evidence to support that theory.

We are all aware of the recent case in Philadelphia in which a woman claimed she had lost her psychic powers as a result of an adverse reaction to a dye administered in doing a CAT scan. She sued Temple University Hospital. The judge told the jury not to give her any damages for loss of psychic powers, but the jury awarded her $988,000 anyway. That, I would contend, is the real reason behind this legislation. It is not that these claimants think they have a good case, but that they want to try it out before a jury and see if they can get the pot of gold.

That brings me to my fourth and final point. It is really surprising that legislation of this kind would be considered in light of the general concern about rising tort liability and the need for tort reform which you, Mr. Chairman, have so eloquently spoken on and have sponsored legislation to deal with.

I think it is telling that Congressman Boucher said that the purpose of his bill was to provide a day in court for the 250,000 indi-

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viduals who were exposed to radiation. I would suggest that the last thing in the world we need to do is dump 250,000 additional cases in our courts. These courts are already overloaded by an explosion of tort litigation which has been caused by grave distortions in our legal system. I think that is the real issue in this case.

It is quite clear that the primary motive for this kind of legislation—or much of the impetus behind it—is coming from plaintiffs' lawyers. In the multidistrict consolidated atmospheric testing litigation, there is an appeal pending now on the constitutionality of the "Warner Amendment." Lawyers in that case asked for an extension of time on filing their briefs, telling the court that "The appellants and their counsel have been and continue to be closely involved in the legislative process leading to the enactment of H.R. 1338 and consideration of S. 2454."

So, as Senator Domenici pointed out, it is worth the committee's considering who are going to be the real beneficiaries of this kind of legislation, and I would suggest that it may very well end up being the lawyers. Thank you.

[The prepared statement of Mr. Willard follows:]

STATEMENT

OF

RICHARD K. WILLARD
ASSISTANT ATTORNEY GENERAL
CIVIL DIVISION
U.S. DEPARTMENT OF JUSTICE

BEFORE

THE

SENATE JUDICIARY COMMITTEE

CONCERNING

S. 2454

ON

JUNE 27, 1986

STATEMENT OF RICHARD K. WILLARD

I am pleased to appear before the Committee today to present the views of the Department of Justice on S.2454, a bill to repeal Section 1631 of the Department of Defense Authorization Act of 1985, relating to the liability of government contractors for injuries or losses of property arising out of the atomic weapons testing programs.

S.2454 would repeal legislation recently enacted by the 98th Congress to enable all litigation arising from atomic weapons testing programs to be resolved under one set of statutory provisions, the provisions of the Federal Tort Claims Act (FTCA). The Administration opposes modification or repeal of Section 1631 because Section 1631 fairly and reasonably applies neutral legal concepts to this litigation. Litigation arising out of the atomic weapons testing programs should be resolved under the provisions of the Federal Tort Claims Act, thereby assuring all persons, parties to the litigation and the public, of equal justice under federal statutory provisions enacted and perfected over a period of forty years to regulate tort suits against the United States.

Section 1631

Section 1631 of P.L. 98-525, 42 U.S.C. § 2212, creates an exclusive remedy against the United States for actions based on acts or omissions by a contractor in carrying out an atomic weapons testing program under contract with the United States.

This Act requires that the United States be substituted as the sole party defendant in any suit against the contractor upon certification by the Attorney General that the action is against a contractor as defined in Section 1631 and that the action alleges injury "due to exposure to radiation based on acts or omissions by a contractor carrying out an atomic weapons testing program with the United States." 42 U.S.C. § 2212(a)(1). Pursuant to regulations promulgated under Section 1631(b), 1/ the Department of Justice has received 130 requests from contractors for certification. None of these requests have been denied, although a number of the requests have not been acted upon. In a carefully considered opinion, Section 1631 has been upheld and applied to extensive proceedings involving numerous plaintiffs consolidated before the United States District Court for the Northern District of California. In re Consolidated United States Atmospheric Testing Litigation, 616 F. Supp. 759 (N.D. CA 1985). 2/ The United States District Court for the District of Nevada has likewise upheld and applied Section 1631 to numerous cases pending before it. Keith L. Prescott v. United States, et al., D. Nev., Consolidated Docket No. CV-LV-80-143RDF (Order entered December 4, 1985). In addition, the First Circuit Court of Appeals has applied Section 1631 to a case pending before it and, as was true in the consolidated

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1/ The regulations and delegations of authority implementing Section 1631 are set forth at 49 Fed. Reg. 4995 (November 14, 1984) (amending 28 C.F.R. § 15.3(c)(3)), and 49 Fed. Reg. 47583 (December 5, 1984).

2/ Plaintiffs have filed a notice of appeal from this decision with the Ninth Circuit. (9th Cir. No. 85-2842).

cases and in Prescott, has rejected each of the many and varied constitutional attacks upon Section 1631 pressed by plaintiffs and their counsel. Hammond v. United States, 786 F.2d 8 (1st Cir. 1986).

Section 1631 creates as an exclusive remedy--a cause of action solely against the United States--for injuries "due to exposure to radiation based on acts or omissions by a contractor in carrying out an atomic weapons testing program under a contract with the United States." Any suit arising from specified activities of these contractors is to be maintained pursuant to the pre-existing provisions of the Federal Tort Claims Act, "without regard to when the act or omission occurred." A savings provision enables plaintiffs to file administrative claims pursuant to the Federal Tort Claims Act even if their claims might otherwise be deemed barred.

We firmly believe that the liability of the United States should be as provided under the Federal Tort Claims Act. Section 1631 substituted the United States for contractor defendants in both pending and future suits alleging radiation injuries arising from this national defense program. In doing so, Section 1631 placed the litigation within the purview of the Federal Tort Claims Act and gave the plaintiffs the same rights against the United States that any other plaintiffs have suing the United States for injuries arising out of activities which are federal responsibilities--no more and no less. Section 1631 did not blur "the distinction between a Federal Instrumentality and a Contractor" and took into account concerns

that a result which would permit "extension to contractors of the jurisdictional limitation of Federal liability in the Federal Tort Claims Act" would set an undesirable precedent by leading "other contractors to demand similar protection under the tort claims provisions of title 28." 3/ Instead, the status of the nuclear weapons contractors as contractors with the United States remains unaffected by Section 1631, but the litigation filed against the contractors is sensibly enough deemed to be litigation against the United States. 4/

It should be clearly stated that Section 1631 does provide a new remedy against the United States. In general, the United States cannot be sued for activities of atomic weapons program contractors arising out of their operations under their contracts. See, e.g., Bramer v. United States, 595 F.2d 1141 (9th Cir. 1979); Blaber v. United States, 332 F.2d 1629 (2d Cir. 1964). Thus, Section 1631 provides a right to sue the United States notwithstanding the contractor exclusion to the FTCA (28 U.S.C. § 2671) where no right to sue the United States had heretofore existed. In short, Section 1631 substitutes the United States for contractor defendants in radiation injury suits arising from the atomic weapons testing program, precludes reliance upon the contractor exclusion from the Federal Tort Claims Act,

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3/ H. Rept. No. 98-124, 98th Cong., Part IV, at 4.

4/ The United States may not raise the "contractor exclusion" in defense of suits filed under Section 1631. Section 1631(a)(2). However, the concern that the distinction between the federal government and contractors remain intact for all other purposes is otherwise met.

and provides a new remedy against the United States for acts or omissions of nuclear weapons contractors subject only to the same terms and conditions upon suit that are applicable in any other suit filed against the United States under the Federal Tort Claims Act. This is a fair and reasonable resolution of the problems presented by the unprecedented litigation against the atomic weapons contractors arising, as it does, from the vital assistance they have provided to our national defense effort.

As of June 1, 1986, 51 cases subject to Section 1431 had been filed, involving over 3,100 plaintiffs seeking over $8.5 billion. A majority of the plaintiffs are veterans alleging that they were exposed to radiation in the course of their military service. These veterans are entitled to file claims for benefits under the laws administered by the Veterans Administration. In the administration of laws enacted for the benefit of veterans, the Veterans Administration resolves reasonable doubts in favor of veterans seeking benefits. Moreover, the Congress, through the passage of Public Law 98-542, has taken special action to ensure that radiation exposure claims are fairly considered by the Veterans Administration. Thus, the veterans seeking recoveries in suits subject to Section 1431 have available remedies to provide for their wellbeing. It is one of the tragedies of this litigation, however, that many veterans are unaware that it is very unlikely, in the extreme, that their cancers are in any way related to their military service.

Radiation-Induced Cancer

National Cancer Institute data indicate that approximately 930,000 people in the United States will be diagnosed as having cancer this year. If skin cancer is considered, too, the cancer diagnoses anticipated this year increase to nearly one and one-half million. 5/ "About 73 million Americans now living will eventually have cancer; that is, about 30% of all Americans, according to present rates. Over the years, cancer will strike in approximately three out of four families." 6/ Cancer is the second leading cause of death in the United States. 7/

Although ionizing radiation is the most extensively studied human carcinogen, 8/ it is a less significant cause of cancer when compared with other carcinogens--the National Institutes of Health have determined that "[l]ess than 3% of the U.S. cancer burden can be . . . attributed to ionizing radiation from natural sources and human activities, compared to around

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5/ American Cancer Society: 1986 CANCER FACTS & FIGURES, at 3. These estimates are based upon incidence rates from the National Cancer Institute SEER Program (1977-1981).

6/ Id.

7/ Id., at 5.

8/ D. SCHOTTENFELD and J. FRAUMENI, CANCER EPIDEMIOLOGY AND PREVENTION (1982), at 231.

30% for tobacco smoking." 9/ Of the ionizing radiation from natural sources and human activities, about 1.5% is attributable to atmospheric weapons tests (present testing by countries not signatory [India, China, France, Pakistan], and continuing fallout from the testing which occurred in the 1950s and 1960s). 10/

Our most definitive information about the health effects of radiation are derived from the Japanese atomic bomb survivors. These data show that among 63,035 atom bomb survivors who were exposed to high levels of radiation--100 or more rad--there were 498 cancer deaths from 1950 to 1978, when only 323 deaths were expected--a fifty-four percent increase. 11/ But, among the Japanese survivors who were exposed to low-level radiation--less than nine rads--fewer cancer deaths than the number which would

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9/ NIH: "Report of the National Institutes of Health Ad Hoc Working Group to Develop Radioepidemiological Tables," p. 13 (citing S. JABLON and J. BAILER, "The Contribution of Ionizing Radiation to Cancer Mortality in the United States." Preventive Medicine 9:219-222 (1980).

10/ National Research Council: "The Effects on Populations of Exposure to Low Levels of Ionizing Radiation: 1980 (BEIR III), at 99.

11/ NIH, supra, at p. 13 (citing H. KATO and W. SCHULL, "Studies of the Mortality of A-Bomb Survivors." Radiation Research 90:395-432 (1982)).

normally expected were observed. 12/ Of course, virtually all the veterans who are plaintiffs in the lawsuits at issue were exposed to very low levels--the vast majority in fact were exposed to less than one rad.

Between 1945 and 1962, about 203,000 military personnel, including civilian employees of the Department of Defense, participated in atmospheric nuclear weapons tests conducted at continental sites and in the Pacific Ocean. 13/

Since 1977, the Department of Defense has committed nearly 150 man-years per year, at an annual expense of over six million dollars, in an effort to study the health effects among military personnel who were exposed to radiation during the atmospheric tesing program. 14/

The two most significant conclusions of this study to date are:

First, of the doses estimated for the participants, "about 99% are smaller than the doses received by the personnel from natural and medical sources of ionizing radiation (about 5 rems in 30 years)." 15/ The calculation of these doses was reviewed

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12/ Id.

13/ National Research Council: "Review of the Methods Used to Assign Radiation Doses to Service Personnel at Nuclear Weapons Tests" (1985), at 1.

14/ Defense Nuclear Agency: "Fact Sheet re: Nuclear Test Personnel Review" (April 3, 1984), p. 2.

15/ National Research Council: "Review of the Methods Used to Assign Radiation Doses to Service Personnel at Nuclear Weapons Tests" (1985), p. 25. Note: An individual notification and medical examination program for all individuals who received doses higher than 5 rad has been undertaken. Defense Nuclear Agency: "Fact Sheet," at 3-4.

by a special committee convened by the National Research Council. The committee found that the estimations of external dose were "reasonably sound" and that the internal dose was probably overestimated. 16/

Second, "when the data from all of the tests are considered, there is no consistent or statistically significant evidence for an increase in leukemia or other malignant disease in nuclear test participants." 17/

These two findings confirm the statement of Dr. Rosalyn Yalow, a Nobel Prize laureate in Medicine and Physiology, that the carcinogenic effect of low-level radiation, if any, ". . . is so minimal that epidemiologic studies cannot provide significant statistical data." 18/

Litigation Concerns

In the legislation it has enacted to date, Congress has demonstrated a marked preference for providing remedies that do not involve litigation for persons, particularly veterans, who assert that they have suffered injury due to exposure to radiation resulting from the Atomic Weapons Testing Program. See, e.g., Veterans' Dioxin and Radiation Exposure Compensation Standards Act, P.L. 98-542, 98 Stat. 2725, et seq. (1984); Veterans' Health Care Amendments of 1983, P.L. 98-160, § 601,

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16/ Id., at 2.

17/ National Research Council, "Mortality of Nuclear Weapons Test Participants" (1985), p. 44.

18/ R. YALOW, "Reply to K. Z. Morgan's Comments," Molecular Cell Biophysics 2:49-55 (1983).

97 Stat. 1006-1008; Veterans' Health Care, Training, and Small Business Loan Act of 1981, P.L. 97-72, § 102(a)(2), 95 Stat. 1047-1048. Of particular note in this regard is the Veterans' Dioxin and Radiation Exposure Compensation Standards Act, in which Congress sought to ensure "a fair and balanced approach to resolving . . . compensation questions" (130 Cong. Rec. § 6159 (daily ed. May 22, 1984) (remarks of Sen. Cranston)) by establishing a "general framework for the adjudication of exposure claims" (130 Cong. Rec. § 13592 (daily ed. Oct. 4, 1984) (remarks of Sen. Simpson)) in the VA benefits system. At bottom, counsel representing plaintiffs in litigation subject to Section 1631 have expressed a contrary preference.

The Tort Policy Working Group, which I chair, has confirmed that there has been a large increase in both the number of tort lawsuits and award of damages and that there has been an increased use of novel theories of liability for recovery. 19/ We have expressed a widespread and very realistic concern about the effects of tort litigation on our ability to obtain necessary medical care at an affordable price and to engage in desirable social and economic activities which we have heretofore taken for granted but which may be withdrawn because of the lack of affordable insurance. The genesis of Section 1631 is related to these concerns as well as national security concerns.

Section 1631 was prompted by expressions of concern that "the military applications of atomic energy could not proceed

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19/ See "Report of the Tort Policy Working Group on the Causes, Extent and Policy Implications of the Current Crisis in Insurance Availability and Affordability", at 45-52. (February, 1986).

either technically or economically" without recognizing the contributions of the contractors participating in the atomic weapons testing programs. 20/ S.2454 would run directly contrary to the need for reform because it would place a premium upon developing questionable theories of liability to hold contractors participating in the atomic weapons testing program liable for activities undertaken directly and specifically at the direction of the President. Moreover, each of the contractors subject to Section 1631 is entitled to full indemnity for any adverse judgments in the litigation which S.2454 would engender. Thus, the costs of recoveries predicated upon questionable theories of liability would be borne by the taxpayers; litigation expenses of fending off these litigative challenges would likewise be borne by the public pursuant to these contracts. Given the comprehensive remedies already available and the lack of any sound basis for the litigation, this Committee should reject the efforts of plaintiffs' counsel 21/ to repeal the statutory framework governing the litigation. S.2454 would reward unreasonable efforts to twist legal principles beyond recognition in order to provide

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20/ Sen. Rept. No. 98-500, 2d Sess., at 375-376.

21/ Enactment of legislation is a part of plaintiffs' announced litigation strategy; they have moved for a stay of the appellate proceedings in the Consolidated United States Atmospheric Testing Litigation predicated upon passage of H.R. 1338 by the House of Representatives. See, Appellants' Motion to Vacate Briefing Schedule and to Temporarily Stay Appeal or in the Alternative for an Extension of Time to File Opening Brief, dated June 2, 1986 (9th Cir. No. 85-2842).

preferential recoveries. The pending litigation should be permitted to run its course; therefore S.2454 should be rejected.

H.R. 1338

H.R. 1338, which has passed the House of Representatives, differs from S.2454. Unlike S.2454, H.R. 1338 would amend the Federal Tort Claims Act. Specifically, H.R. 1338 would permit suits against the United States for acts of atomic weapons program contractors but would not permit many of the Federal Tort Claims Act's conditions and exclusions to apply to suits against the United States.

This would result in a limited class of plaintiffs who would be afforded different treatment from others who may sue the government, including other similarly situated individuals. In addition, it would set a precedent for removing defenses under the Federal Tort Claims Act which serve overriding governmental and societal interests.

Limitations on tort suits otherwise permitted to be maintained against the United States make eminent sense. Over the years, the Congress has moved cautiously to ensure that the government will not be visited "with novel and unprecedented liabilities" as a result of expanded tort liability. Feres v. United States, 340 U.S. 135, 142 (1950), because expanded remedies could result in enormous additional cost to the federal taxpayer. Thus, under the FTCA "liability does not arise by virtue either of United States ownership of an inherently dangerous commodity or property, or by engaging in an 'extra

hazardous activity'." Dalehite v. United States, 346 U.S. 15, 45 (1953). In recognition of the uniquely governmental nature of certain activities and decisions, matters which are discretionary functions may not form a basis of liability. 28 U.S.C. § 2680(a). Jurisdiction under the Federal Tort Claims Act extends to loss of property or personal injury or death caused by negligent or wrongful acts or omissions, a term which provides both generous and reasonably precise contours within which the courts may exercise subject matter jurisdiction to assess tort damage claims permitted against the United States. 28 U.S.C. § 1346(b). There is no reason to permit one category of damage claims against the United States to be litigated under statutory provisions more favorable to putative plaintiffs than the rules available in all other litigation under the Federal Tort Claims Act.

H.R. 1338 would set an unacceptable precedent that would inevitably be extended into other areas of litigation. It needs to be stressed, as I have previously stated, that the Federal Tort Claims Act permits all persons to sue the United States under one fair and uniform set of procedures and standards without permitting any person to obtain preferential treatment. It was "the importunities to which claimants subjected members of Congress, and the capricious results" that led to enactment of the FTCA. Feres v. United States, 340 U.S. 135, 140 (1950). H.R. 1338 would disregard the reasonable, time-tested framework of the FTCA by creating a class of litigants who would get special treatment

of their claims against the United States under different rules from all other litigants. Surely, it would be difficult to deny other litigants similar treatment and very difficult to deny them the same rights. Within the Justice Department, Torts Branch attorneys currently are handling or supervising cases with total demands for damages in excess of $700 billion. Before the limited, carefully-crafted restraints on huge damage awards established by the FTCA yield to diverse, extraordinary means of enhancing plaintiffs' ability to reach the public treasury, a far stronger justification for abrogating the FTCA's provisions and careful consideration of the adverse consequences surely is warranted.

* * * *

The kinds and types of claims asserted in lawsuits against the United States under the Federal Tort Claims Act are as broad as the reach of the federal government's activities and operations, which is to say very broad indeed. The exemptions and exclusions to that Act express the Congressional recognition that there must be reasonable limits on the taxpayers' willingness to pay claims. These well-established and pre-existing limitations make just as much sense for the additional claims now permitted to be maintained against the United States pursuant to Section 1631 as they do for any other tort claims otherwise permitted to be maintained against the United States. We

believe that Section 1631--but not S.2454 or H.R. 1338--is a "statutory formulation of national policy" which reflects the "delicate, equitable balance between the interests of the United States taxpayers and the alleged victims of nuclear radiation" and, in fact, enactment of either of these two bills would not be in accord with the program of the President. 22/

I appreciate the opportunity to present the Department's views on this legislation and will be glad to answer any of your questions.

22/ H. Rept. 98-124, Part IV, at 4.

Senator MCCONNELL. Mr. Willard, why do we not go on to Mr. Ofte's brief statement and then we will ask questions of both you and Mr. Ofte.

STATEMENT OF DON OFTE

Mr. OFTE. Mr. Chairman, I am pleased to be here this morning. I will summarize very briefly the written statement submitted for the record. I would like to state that the Department of Energy is in complete support of the Department of Justice's position and likewise of Senator Domenici's remarks earlier.

I confine my comments this morning to the operational aspects and the impact of the loss of section 1631 to the Department of Energy's defense program activities.

Going back to the inception of the DOE defense program complex in this country, the Atomic Energy Commission and the initial legislation established a framework which, rather than create a large Government bureaucracy to pursue the very difficult task of development and testing and production of nuclear weapons, elected instead to own these facilities totally to assure ourselves that in every one of these facilities, work would be done solely for the Government and through the Government, but not have many thousands of Federal employees that would constitute a Government staffing. The Government recognized then that the type of management talent that we wanted to have to operate our manufacturing plants and to direct our laboratories was available in the highest quality in our universities and in our industrial complex in this country.

As a consequence of that decision, we have today in excess of 100,000 contractor employees that are indeed operating these Government owned facilities, and 2,500 Government people, with 400 in Washington and the balance out there, onsite monitoring the activities on a daily basis.

As far as the nuclear testing activities are concerned, the President every year authorizes the nuclear weapons test plan. So every test that we have operated for the program since the first one authorized by President Roosevelt at Trinity in Alamogordo, NM, down to today has been authorized by the President of the United States.

The type of contractors that we have in our system, like the University of California, like AT&T that operates Sandia Labs, like Du Pont that operates the Savannah River facility in South Carolina, none of these particular contractors have any fee associated with their contracts—there is no profit, if you will, for them to operate these facilities.

Other contractors are paid fees, but the fees are very small and in the operation of these facilities there certainly is little profit for them. There is no work that is undertaken in these places except through the Department of Energy and under our auspices.

And when you look at the cadre of firms that we have, the Monsantos, the General Electrics, the Allied Bendixes, the Du Ponts and the like, the loss of the protection that was afforded in section 1631 will send a chilling factor throughout the complex. I try to not speculate as to what the outcome of that would be over the years but we have to come up with a new series of contractors that are more willing to undertake the risk and may probably be of a lesser quality than the premier firms that we have today.

Our national laboratories at Los Alamos and Sandia and Livermore have been referred to on many occasions by independent committees that have assessed the Department of Energy's defense activities as being national jewels in the crown and they did not get that way accidentally. They got that way because of the very unique nature of the relationship between the Government and those laboratories.

The loss of section 1631 protection would I think serve to take away something that codified what in actuality had been the relationship between the Government and these contractors. If section 1631 were to be taken away at this point it could have an effect that would be worse than if it had never been passed to begin with.

So we totally support the Department of Justice's position and Senator Domenici's, and that concludes my remarks.

Thank you.

[The prepared statement of Mr. Ofte follows:]

STATEMENT

of

DON OFTE

PRINCIPAL DEPUTY ASSISTANT SECRETARY
FOR DEFENSE PROGRAMS

Mr. Chairman and Members of the Committee:

I am pleased to appear before you today to discuss S. 2454 and H.R. 1338, bills concerning suits arising from the conduct of the United States atomic weapons testing program. S. 2454 would repeal Section 1631 of Public Law 98-525, the Department of Defense Authorization Act of 1985. H.R. 1338 would alter substantially the statutory framework in that law.

The Department of Energy strongly opposes enactment of both S. 2454 and H.R. 1338 because Section 1631 is fair and reasonable and is in the overall national interest. We strongly support the Department of Justice testimony which addresses the litigation and legal policy aspects of the proposed legislation. For my part, I would respectfully submit the Department of Energy's opposition from a programmatic standpoint.

Beginning in about 1942, the United States embarked on one of the most important and far reaching scientific research, development, production, and testing programs in the history of mankind. The program was conceived under emergency conditions at the height of World War II. The Manhattan Project was a wartime program undertaken by President Roosevelt for the purposes of sustaining the survival of the Nation. Despite the enormity of the program, it was conducted in the utmost secrecy. The haste with which it was pursued was dictated by reliable reporting that the United States was in a veritable race with the Third Reich as to who would have the atomic bomb first. The United States won the race, principally because of the singular performance jointly

undertaken by a consortium of America's industrial and university assets under the leadership and direction of the national government. Simply stated, the dawn of the nuclear age would not have come about the way it did -- to the great advantage of the national security -- had not this first of a kind, unique relationship between the government and its nuclear weapons contractors been forged.

With the conclusion of World War II, these contractors almost unanimously chose to end their involvement in atomic weapons programs. The outstanding universities which had participated felt their traditional academic independence might be impaired by too close a continuing relationship with the defense establishment. The giants of industry chose to remain in peacetime production in order to resume profit making ventures and to avoid the "merchants of war" image. While the national policy, as stated in the Atomic Energy Act of 1946, was to encourage the peaceful use of the atom, international events would dictate otherwise. World War II was to be followed by the Cold War. Much of Eastern Europe fell behind the Iron Curtain in 1945 and 1947. Soviet adventurism was further exhibited in the Berlin Blockade in 1948. During that same time, the Chinese Mainland was becoming consolidated under Communist rule. In September 1949, the U.S.S.R. exploded its first nuclear device. Within a year of that event, we had entered the Korean War, achieved initial successes, and were reeling under subsequent setbacks. In the meantime, President Truman reconstituted the World War II partnership under the aegis of the Atomic Energy Commission and recruited additional personnel as well as support of this enormous national effort.

The conduct of the atmospheric nuclear weapons testing program is a matter of history. The United States mobilized some of the best scientific, engineering, and medical minds in the world. This talent pool was enlisted directly within the government and the military, and indirectly through government-owned, contract-operated academic and industrial facilities. Many of them were the same corporations and universities which had contributed so significantly before. The goal of this enormous

effort was to secure what is a quintessentially governmental objective: the military capability of the armed forces. Under the Atomic Energy Act, the Congress granted the President and the AEC considerable discretion in deciding how to reach that goal. Specifically, the Act gave the Commission the option of continuing the system conceived in the Manhattan Project; namely, the option to engage private corporations and universities to perform uniquely governmental tasks under the direction and control of the government.

Immediately following the bombings of Hiroshima and Nagasaki and the surrender of Japan, President Truman had ordered additional research and testing of this revolutionary new technology embodied at least initially in atomic bombs. To assure the war fighting capability of the Navy, he directed that tests be conducted to determine these weapons' effects on ships. This was done in 1946 during Operation Crossroads at Bikini Atoll in the Pacific. It was a combined operation directed and approved by the President, conducted by the military, and included the intense involvement of civil servants and government contractors. Hundreds of ships and thousands of people were involved. More weapons related tests were conducted at Eniwetok in 1948, again involving a massive logistical and military operation and again requiring enormous scientific and technical assistance from the private sector under government direction. This team approach became the essential modus operandi for the next decade of atmospheric weapons testing both in the Pacific and on the continental United States. Exploration of this whole new science was a joint governmental and private sector venture, but because the research had such overwhelming implications for our national survival, the executive branch of government -- with the close scrutiny of the Joint Congressional Committee on Atomic Energy -- closely controlled its every aspect.

By 1950, President Truman again was compelled to make what everyone involved acknowledged was a decision with potentially grave consequences for American citizens. The cost in manpower and time involved in utilization of Pacific Test Sites for routine testing was becoming prohibitive. The timetable for

attaining an operational fusion bomb, which would keep the United States from being relegated to a position of nuclear inferiority, could not be maintained without activating a continental test site. In addition, there was a very real possibility that the military setbacks being sustained by the U.S. in Korea would lead ultimately to the loss of access to the Pacific sites. For these reasons, President Truman, after a thorough analysis of the public safety aspects, authorized a continental test site in Nevada. The Nevada Test Site was to be used for testing of lower yield devices. Testing of high yield devices would still be done only in the Pacific.

The level of R&D effort and the pace of testing was accelerated during the early 1950's. New national laboratories at Albuquerque (Sandia) and in California (Lawrence Livermore Laboratory), as well as additional engineering and construction contractors began operations. Under the direction of and in conjunction with the government, these contractors developed and built the Nation's nuclear arsenal. This unique relationship between the government and the contractors remains essentially unchanged today, constituting an indispensable part of our defense capability. Because of the special status accorded them under the Atomic Energy Act, our nuclear weapons contractors are different from other defense contractors. Some of these contractors have performed without fee or profit over the years as a service to the Nation. Thus, Section 1631 codifies what is entirely appropriate treatment for them under the law.

But the legal doctrines aside, Section 1631 makes practical sense and sound government policy in the context of injury claims resulting from governmental actions. The acts of these contractors in their role in conducting atomic weapons testing were manifestly the acts of the United States. The Atomic Energy Act does not allow otherwise. Even as a non-lawyer, I can understand that claims for injuries resulting from those acts appropriately lie only against the United States, not against the contractors.

I understand that Section 1631 defines that relationship precisely. The devices proposed in the bills being considered today do violence not only to the reality of the relationship, but to the sense of fairness with which these contractors have a right to be treated, especially in light of their enormous contributions to this Nation's security.

That, of course, raises another question. What about fairness for the people who might have been injured by these activities: the test site workers or the servicemen who participated in the tests to examine a person's continued fighting capability in a battlefield environment that includes nuclear weapons?

This Administration is one hundred percent behind fairly compensating any person who it can be reasonably shown has been injured as a result of the atomic weapons testing program. I understand there are and have been orderly, no fault processes in place to accommodate this policy: State Workers Compensation Programs and The Federal Employees Compensation Act for test site and contractor employees, and the veterans benefits statutes for veterans. There is no more sympathetic supporter of veterans than I, and I applaud the Congress' action providing for their well being.

Indeed, the Veterans Dioxin and Radiation Exposure Compensation Standards Act, Public Law 98-542, enacted October 24, 1984, was carefully drafted legislation. It was designed to ensure that VA disability compensation and survivors benefits are provided for radiation related disabilities or deaths. The Act requires that VA regulations be based on sound scientific and medical evidence and mandates that the VA Administrator establish guidelines, and where appropriate, standards and criteria for adjudicating individual benefits claims. The VA published its implementing regulations on August 26, 1985. The Act also provides that a Scientific Council of the Veterans Advisory Committee on Environmental Hazards will assist the Administrator of Veterans Affairs in evaluating the results of studies of the health effects of radiation exposure. The regulations have been in effect less than a year now, and we still await a good

sampling of claims experience with which to evaluate their effectiveness. I urge you to give that program a chance to work.

These bills represent the sense of impatience, indeed a sense of frustration in developing an equitable solution to this problem. But I respectfully suggest that passage of either of these bills is not the answer. They represent an overreaction and are not consistent with reality. I hope you will support administrative solutions, such as P.L. 98-542, the Veterans Dioxin Act, which we believe represent the best prospect of ensuring fairness to everyone involved.

In summary, we believe that administrative methods for perfecting valid claims are superior to a tort remedy, both for the country as a whole and for the claimants. Procedures like those developed pursuant to P.L. 98-542 represent the most expeditious method for handling claims relating to radiation exposure. They should be given an opportunity to work. Accordingly, the Department of Energy opposes enactment of S. 2454 and H.R. 1338, and advises that enactment of either bill would not be in accord with the program of the President.

This concludes my prepared statement, Mr. Chairman. I would be pleased to answer any questions at this time.

Senator MCCONNELL. Thank you, sir.

Mr. Willard, how many suits seeking damages for radiation related injuries, other than suits filed under section 1631, are pending against the United States? What are the number of plaintiffs in the suits? How much in damages is sought, and roughly how many contractors have sought certification from the Attorney General in these suits? Do you have those kinds of figures?

Mr. WILLARD. Well, I really would prefer to provide them for the record, to make sure they are absolutely accurate. I do know that there are substantial numbers of litigation in all categories. My prepared statement does give the number of suits that have been filed pursuant to section 1631, but in terms of the others I would prefer to provide it for the record.

Senator MCCONNELL. If you would get that for me, I would appreciate it. As you well know, I recently introduced a bill, S. 2441, the Government Contractor Liability Reform Act, and you alluded to this earlier. If we were to pass legislation such as S. 2454, thereby in effect returning the contractors to court, would passage of some version of my measure be, in your judgment, advisable?

Mr. WILLARD. Well, it certainly would be an advisable measure. This situation illustrates the need for that kind of legislation, because what we have seen here—as in other cases—is that people are trying to get around the limitations on suing the Government by suing Government contractors. Of course, here the taxpayer directly picks up the tab because of the indemnification arrangement. In other cases, the taxpayer may pick up the tab indirectly because the higher cost of doing business is reflected in the prices charged by the contractor.

In any event, the liability ultimately is taxpayer liability, and that is why legislation such as you propose is necessary. It will put some reasonable limits on that liability which has posed a real problem for a lot of our Government contracting activities.

Senator MCCONNELL. I have a number of other questions for both Mr. Ofte and Mr. Willard, but I think what I will do in the interest of time is submit those to you for responses in writing.

I see that my colleague, Senator Simon, has joined us, and I will now ask him if he has any opening statements.

OPENING STATEMENT OF SENATOR PAUL SIMON

Senator SIMON. This is an area where I have had an interest for some time. I might mention that one of the witnesses, Don Ofte, and I were at college at the same time or we went there with my brother also.

Mr. OFTE. Yes.

Senator SIMON. So he comes here with a considerable handicap, Mr. Chairman. [Laughter.]

Let me, if I may quote from Mr. Ofte's statement, he says these bills represent the sense of impatience, indeed a sense of frustration in developing an equitable solution to this problem.

You are absolutely correct. And let me say, Mr. Willard, as I listened to your testimony, while it may make sense in an ivory tower in the Justice Department, it just does not make sense at all out in the real world.

Let me give you a very practical illustration of how I got into this. A fellow named Bob Farmer came to me who lives in Steelville, IL. He was in the Navy, in the Marshall Islands, when they

had the tests, and when they dropped these test weapons. He was 19 years old. They told him just to duck behind a truck and his fellow seamen did the same. They were wearing only swimming trunks.

When the bomb went off, he noticed he could see the bones in his hands, and as he looked at his buddies he saw their skeletons. After the flash, they went out and they scrubbed down these boats in the middle of this test. No one told them you might have a radiation problem. They played on the beach. He thought nothing of it.

He came home, got married, and all of a sudden he started developing tumors. He and his wife had nine children. There was no evidence of any genetic problem in the history of either family. As it turns out, one of the nine children had a hip deformity, but they thought that that was it. But now they have discovered genetic deformities in all nine children.

The Veterans' Administration says this is not service related. Now, I got interested in his case and all of a sudden I found out that there are a lot more. And the study you cite has been criticized, as you are probably aware, by the GAO as not being a valid study.

We have a problem and the Federal Government is trying to wash its hands of this whole thing. Maybe there are defects in this proposal. But for the Federal Government just to say sorry, you served us, but we are not going to take any responsibility is very strange, and it is also strange that we have a compact—I guess the President has signed it by now—with the people in that area of the Marshall Islands where we compensate the citizens of the Marshall Islands for the damage that was done to them through the Defense Department for their exposure, but people like Bob Farmer, who was a young man, receive nothing.

Now, Bob Farmer is probably going to die before we get anything done, but there are others out there who have thyroid cancer, leukemia and other complications. I do not think we can just wash our hands and say sorry, fellows, we are not going to assist you, you cannot get help from the Veterans' Administration, the Justice Department is going to send up people here to say we do not want you to sue the Federal Government, we do not want you to sue the contractors, we expect you to just sit at home and twiddle your thumbs and enjoy your cancer.

Now, somehow we have to come up with better answers, Mr. Willard.

Mr. WILLARD. Well, if I could respond to that, Senator, I think the question really highlights two points that are separate issues. One is the question about whether servicemen—who were in fact injured or came down with illnesses such as cancer as a result of exposure to radiation—ought to be compensated by being able to sue the Government, as opposed to applying for veterans benefits. In this situation, it is highly unfair to provide a preferential right to sue, because most veterans who were injured or killed in wartime service leave children without fathers behind and do not get to sue to recover damages, but have only the veterans benefits provided by Congress.

Unfortunately, a lot of people are injured or killed at a time of war, some as a result of the negligence or stupidity of their com-

manding officers or of Government officials who make unwise decisions. If every one of those people could file a lawsuit about it, then as I have indicated, not only would it have an adverse impact on national security, we would have to add a lot of lawyers just to handle the litigation. But our country has established a policy that the serviceman should not be able to file a lawsuit for those kinds of injuries; instead, the serviceman should receive benefits through the Veterans' Administration.

Senator SIMON. OK. But here is where we ran into the problem. If I get shot in the arm and I cannot use my arm, the Veterans' Administration will acknowledge that liability. Right after the bombing of Nagasaki, the Japanese surrendered and we sent these people in, without warnings. But 20 years later, they are developing thyroid cancer, leukemia, and the Veterans' Administration says sorry. The Justice Department comes in and says we do not want you to sue the Government.

Mr. WILLARD. Well, Senator——

Senator SIMON. There have to be some sensible answers.

Mr. WILLARD. Well, I would like to explain about the Veterans' Administration. The Veterans' Administration does not have a policy against providing compensation in these cases. In some situations they have. The complaint as I understand it is——

Senator SIMON. Do you know how many?

Mr. WILLARD [continuing]. That it is only about 1 percent of the people who applied for benefits——

Senator SIMON. That is correct.

Mr. WILLARD [continuing]. For cancer received them. Now, if there is something wrong with the VA decisionmaking mechanism, if they are not considering the evidence properly, if they are biased, or whatever, then I think Congress ought to try to fix that system and make it work fairly if you think it is not working properly. In fact, that is what the 1984 legislation is designed to do. Those cases are being processed under the new legislation which gives the veteran who is applying for benefits as a result of his or her exposure to radiation, dioxin, agent orange, or whatever, every benefit of the doubt in terms of special procedures for being able to prove their case.

There is no reason to believe that a court can do that more fairly or differently than the Veterans' Administration. However, if the Congress thinks there is a systemic problem there, if you think that the rules of evidence are not working the right way or if the decisionmaking is biased, then I would suggest amending the 1984 legislation to make that system work fairly, rather than creating this avalanche of new litigation in Federal courts.

Senator SIMON. OK. I not only think there is a problem, I know there is a problem and the Veterans' Administration is not giving these people the benefit of the doubt. Veterans are dying off and their families are suffering. They want some alternative and one way or another I think we have to see that justice is done for them. I would like the Department of Justice to pursue justice and see that these people get justice. I think if you are going to live up to your name, you have to do more than come up here and testify against this bill.

Mr. WILLARD. Could I respond to that, Senator?

Senator SIMON. Yes.

Mr. WILLARD. As I indicated in my statement, there are—or are expected to be—many thousands of veterans who participated in the testing program who are going to have cancer. The current law provides that if they can show that their cancer resulted from exposure to radiation when they were in the service, they are entitled to benefits. They are supposed to get the benefit of the doubt. That is what the law says and that is now the procedure is supposed to operate. But that does not mean that everyone who applies for benefits is entitled to them, because current cancer rates indicate most of those people who have come down with cancer would have come down with it anyway because it is a very prevalent disease in our society.

Senator SIMON. But certain kinds of cancers are a result of this kind of exposure, and as far as giving the benefit of the doubt to those veterans, let me tell you, it is not happening. I think maybe the Justice Department, in addition to testifying here, ought to pursue whether the Veterans' Administration is living up to the law in that regard.

Thank you, Mr. Chairman.

Senator MCCONNELL. Thank you, Senator Simon.

Senator Grassley also has three questions which he would like to have answered in writing from both of you and we will submit that to you.

[The reponse to questions of Senator McConnell follow:]

U.S. Department of Justice

Office of Legislative and Intergovernmental Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

2 1 AUG 1986

Honorable Strom Thurmond
Chairman
Committee on the Judiciary
United States Senate
Washington, D. C. 20510

Dear Mr. Chairman:

The following is in response to questions asked of Assistant Attorney General Richard Willard at the June 27, 1986, full Committee hearing on Government Liability for Atomic Weapons Testing Program, S.2454 and H.R. 1338. At the hearing, Senator McConnell asked the following questions:

Q. "Mr. Willard, how many suits seeking damages for radiation related injuries, other than suits filed under section 1631, are pending against the U.S.? How much in damages is sought, and roughly how many contractors have sought certification from the Attorney General in these suits? Do you have those finds of figures?"

A. According to the Department's radiation litigation support data, as of August 4, 1986, the answers to these questions are as follows:

-- Number of Pending Suits Other Than Section 1631 - - - - - - - - - - - 110

-- Number of Plaintiffs In Those Suits - - - - - - - - - - - - - - - 4,456

-- Total Sum Sought In Those Suits - - - - - - - - - - - - - $ 2,578,476,365

-- Number of Contractors Seeking Certification Under Section 1631 - - - - - - - - - - - - - - 9 [1/]
(These contractors have made a total of 135 requests in 54 suits.)

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1 A wholly-owned subsidiary of a contractor is counted as a separate contractor when it is sued separately.

In addition to Senator McConnell's questions, Senator Grassley has also submitted the following follow-up questions in writing.

Q. Please provide a list identifying each contractor with the Department of Energy who has requested certification from the Attorney General.

A. As indicated in the information above, the Attorney General has received requests for certification from nine contractors. They are: AT&T, Bell Laboratories, EG&G Inc., General Electric, Holmes and Narver, Inc., Reynolds Electric Co., Sandia National Laboratories, The Regents of the University of California, and Western Electric.

Q. Does the Veterans Administration know the number of claims it has received alleging radiation-caused injury arising form nuclear tests? If so, can you obtain the information from the Veterans Administration and supply it to us?

A. We are advised by the Veterans Administration that the number of claims for radiation related injuries filed by veterans is 4,539 with an additional 344 claims filed by survivors of deceased veterans.

I hope this information adequately answers your questions. I would appreciate it if this information is inserted at the appropriate point in the hearing record. Please let me know if the Department of Justice can be of further assistance.

Sincerely,

John R. Bolton

John R. Bolton
Assistant Attorney General

Senator MCCONNELL. Thank you very much for coming.

Our next witnesses comprising a panel are Prof. William Fletcher, professor of law at the University of California, on behalf of the National Coalition for Radiation Victims; Paul S. Egan, deputy director, National Legislative Commission, American Legion; Dale Haralson, an attorney in Arizona, on behalf of the National Association of Radiation Survivors; Robert Faron, a partner in Barnett and Alagia, on behalf of the National Association of Atomic Veterans.

Professor Fletcher, we will start with you.

PANEL CONSISTING OF DOROTHY LEGARRETA, ADMINISTRATIVE DIRECTOR, NATIONAL ASSOCIATION OF RADIATION SURVIVORS, ACCOMPANIED BY DALE HARALSON; WILLIAM A. FLETCHER, PROFESSOR OF LAW, UNIVERSITY OF CALIFORNIA, ON BEHALF OF THE NATIONAL COALITION FOR RADIATION VICTIMS; PAUL S. EGAN, DEPUTY DIRECTOR, NATIONAL LEGISLATIVE COMMISSION; AND ROBERT S. FARON, BARNETT & ALAGIA, ON BEHALF OF THE NATIONAL ASSOCIATION OF ATOMIC VETERANS

Ms. LEGARRETA. I would like to introduce Professor Fletcher, Senator McConnell. My name is Dorothy Legarreta, and I want to thank you for the opportunity to present testimony in favor of S. 2454. I am the administrative director of the National Association of Radiation Survivors. I am pinch-hitting for our legislative director, who died, another cross-road veteran like Bob Farmer, this past Sunday of a massive heart attack.

We are a 5,000 member organization composed both of atomic veterans and atomic civilians, and we urge passage of S. 2454 to allow us our constitutional rights among other rights to a trial by jury. On behalf of NARS, I want to thank Senator Murkowski who held hearings on this issue last year and where we gave testimony to the negative effects of the Warner amendment on our membership.

I want to comment that we are now in a post-Challenger and post-Chernobyl era subsequent to the testimony before Senator Murkowski's Veterans' Affairs Committee. I think we are all aware that our technology may be flawed and we here have the opportunity to right past wrongs that were done to our own citizens in the name of national security.

As many of you know, I was an employee of the Manhattan Engineering District back in the forties at the University of California site where I witnessed first-hand some of the negligence you are going to be hearing about from Attorney Dale Haralson.

I would like now to present Prof. William Fletcher, who is a professor of law at the University of California, in Berkeley. He is also an expert on constitutional law and Federal jurisdiction. He is a graduate of Harvard College and the Yale Law School. He is a Rhodes scholar, a former naval officer, and a Supreme Court law clerk.

He has published articles on constitutional issues in the Harvard Law Review, the Yale Law Journal, and the Stanford Law Review. I present constitutional law professor William Fletcher.

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Senator MCCONNELL. Thank you.

STATEMENT OF WILLIAM A. FLETCHER

Mr. FLETCHER. First, I would like to thank the committee for having invited me to testify on the issues before us. I am a professor at the University of California.

Senator MCCONNELL. Professor, excuse me. If I may mention to all of you, as I did the witnesses previously, I would like to have you summarize your testimony and we will put the entire text in the record.

Mr. FLETCHER. I would be glad to do so. I have submitted my testimony in written form for the record and I will summarize only key parts of it and respond to some of the things that I have heard so far today.

I would like to say first that I am not myself a plaintiff lawyer and that I do not stand to benefit in any way personally from the passage either of S. 2454 or H.R. 1338. I have not been personally involved in these issues. I come at it only as an American citizen and as a professor deeply involved and interested in questions of constitutional law.

Let me begin by describing the Warner amendment and what it does, because from the testimony that I have so far heard it appears to me that there may be some fundamental misconception as to what it did.

Prior to the passage of the Warner amendment, persons injured in the atomic weapons testing program had the ability to sue private contractors alleging that they had been injured because of the negligence of those contractors, just as any private citizen would have the right to sue any other private contractor.

To give you an analogy, it is an hypothetical analogy at this point, but to give you an analogy, one could imagine, for instance a survivor of one of those in the shuttle suing a private contractor alleging that the contractor had negligently constructed parts of the shuttle. It is that sort of lawsuit. That sort of lawsuit has always been available to members of the military against contractors who had done certain things.

There are defenses. There is, for instance, the Government contractor defense, there are causation defenses. They are not slam-dunk winners of lawsuits, but they have always existed and they have always existed for members of the military.

The Warner amendment effectively eliminated the ability to bring such a suit by providing that the United States should be substituted in place of the defendant and then able to assert defenses not available to those contractors. It is as if—and again I emphasize that this is a hypothetical—it is as if the survivor of one of the military people on the *Challenger* had brought suit against a private contractor.

Let us assume—and again, this is a hypothetical—that negligence could have indeed been shown. The suit gets under way and the private contractor comes to the Government and gets a new Warner amendment passed which provides that this suit must be dismissed. That is what the Warner amendment did.

The Warner amendment is unique in American law. It has four characteristics that I should point out to you for you fully to understand its uniqueness. First, it provides that there should be sovereign immunity for private contractors. This is very unusual and to the extent that it exists shows up for drivers who drive for the Federal Government, health care employees of the Federal Government, and in one example that is the closest, but as I point out, not very close, for manufacturers of the swine flu vaccine. Those are the only examples of private contractors being afforded the sovereign immunity of the Government.

Second, the amendment is retroactive. Not only is it retroactive in a sense of abrogating causes of action that had already accrued, but more important, it is retroactive in that it applies to suits actually pending at the time of the lawsuit, and I will come back to that because that is an important constitutional issue.

Third, it eliminates the right of trial by jury. Fourth, and perhaps most interesting as a practical matter and maybe as a political matter, it provides protection to the private contractors that already existed. That is to say, the private contractors were not vulnerable to damage awards because they all had indemnification contracts with the Government.

There are a number of constitutional arguments that can be made against the Warner amendment. I would like to emphasize the argument that I find the most compelling and advance it to you and suggest that it might be appropriate for the Senate, perhaps more than appropriate, even indeed compelling on the Senate to repeal a law that is unconstitutional without waiting for the courts to do it instead.

The argument that I find most compelling is one based upon separation of powers. Suits were filed against the private contractors. The private contractors, suspecting that these suits would be terribly uncomfortable for them and perhaps that they might even lose them, came to the Government and got the Warner amendment passed.

It effectively changed the rules in midstream. It was not retroactive merely in the sense of affecting potential lawsuits. It was directly aimed at pending litigation. Now, as was testified before the committee hearing, the issues involved in Representative Boucher's bill in the fall, we have here Mr. Willmore representing the Justice Department saying it was as a result of the development of these lawsuits, particularly the very large, those in litigation in California, that brought the contractors and the administration to Congress, and that necessitated some congressional action, section 1631, in other words the Warner amendment was the result.

In other words, the Justice Department itself says that the Warner amendment was directly responsive to pending lawsuits. There is a separation of powers problem here. It is the law that Congress cannot do certain things to interfere with the operation of the judiciary.

There is an old post-Civil War case, *United States* v. *Klein*, which has recently been construed by the U.S. Supreme Court in 1980 in *United States* v. *Sioux Nations*. Klein as construed recently by the U.S. Supreme Court holds that it is a violation of the separation of

powers for Congress to change the rule in a pending case. No. 1, and to do so to its own advantage.

Well, that is precisely what has happened here. They have changed the rule directly in response to these lawsuits. This was not an accidental byproduct of legislation passed for other reasons, and they have done so to their own benefit, directly to their own benefit, and I submit under the Sioux Nations construction that is forbidden as well it should be under the Constitution.

Let me briefly allude to policy reasons behind it, without going through the other constitutional arguments in my prepared statement. Sovereign immunity has been among academic commentators and indeed in the Congress in this century an unpopular doctrine, a necessary evil, if you like, the evil that should extend no further than the necessity that might produce it.

I see no necessity here. This bill, as H.R. 1358, has nothing to do with the Feres doctrine. This bill would permit private civilians and former military people to sue private contractors as military people elsewhere have still the right to do. That is the effect of this bill. It has nothing to do with the Feres doctrine.

I ask myself why was the Warner amendment passed, and I come up with a rather disturbing speculation. The private contractors are not on the hook financially in these lawsuits because of the indemnification agreements. Why then are they so interested?

One consequence occurs to me, and that is these suits as we have now seen in California and as we have now seen in the first circuit and as we have now seen in Nevada are dismissed at the very outset, before any discovery has been meaningfully undertaken, and certainly before any testimony has been presented in open court. That then has the consequence, of course, of shielding from judicially sanctioned discovery and shielding from public exposure by public testimony what actually happened in these tests, and it seems to me that one consequence of the Warner amendment has been to assist in the concealing of the information in these cases.

I think that Congress did not fully understand what it was doing when it passed the Warner amendment. It was passed in a way that I have outlined in my statement, as a rider to an unrelated bill. I think Congress has unwittingly participated in a form of coverup.

Finally, in conclusion, I would like to say that I have returned to testify from Germany where I am a visiting professor this summer and I was speaking to German professors as to why I was coming back, describing this. They were, I must say, puzzled that our country should act in such a way.

My response to them was to say that I thought the Congress had made a mistake in passing the Warner amendment and that I expected that the mistake would be rectified, and that was the response with which I felt most comfortable, and I must say it is the only appropriate response under these circumstances.

Thank you very much.

[The prepared statement of Mr. Fletcher follows:]

TESTIMONY OF PROFESSOR WILLIAM A. FLETCHER
ON S. 2454

Mr. Chairman and Members of the Committee:

I am William A. Fletcher, Professor of Law at the University of California, Berkeley (Boalt Hall). I have been invited by the Committee to submit this testimony on S. 2454 and on the constitutional and policy issues raised by suits against government contractors in the atomic weapons testing program. This testimony is divided into three parts: first, a brief summary of existing law; second, an analysis of constitutional and policy problems posed by existing law and, in particular, the so-called Warner Amendment; and third, a comparison of S. 2454 and H.R. 1338 (the "Boucher bill"), and a discussion of what they would accomplish.

I. Existing Law

Suits for damages against government contractors involved in the atomic weapons testing program are currently governed by the Warner Amendment, Section 1631 of the Department of Energy National Security and Military Nuclear Energy Authorization Act of 1985 (codified at 42 U.S.C. §2212). That amendment provides that in any action for injury, loss of property, personal injury, or death due to exposure to radiation based on acts or omissions by a government contractor in the atomic weapons testing program, the action shall be deemed a tort action brought against the United States under the Federal Tort Claims Act ("FTCA"). 42 U.S.C. §2212(b). While the amendment says nothing on its face about substitution of the United States as a party defendant in such actions, that is its apparent effect. Id. §2212(a)(2). The United States may raise in such an action any defenses that would ordinarily be available to it in a proceeding under the Federal Tort Claims Act. Id. §2212(a)(2). The amendment applies explicitly to actions pending at the time of its enactment. Id. §2212(c).

The Warner Amendment was passed in 1985 as a rider to an unrelated energy bill. The Judiciary Committee of the House of Representatives had considered a predecessor bill in 1983 that would have had the same consequence as the Warner Amendment. After hearings, the Committee reported adversely on the bill because of its concerns about the bill's fairness and its constitutionality. H. Rep. 124, 98th Cong., 1st Sess. 6 (1983) (Adverse Report). In substantial part because of the adverse report, the bill was killed in 1983. When the Warner Amendment was passed two years later, the House Judiciary Committee was bypassed. The Senate Judiciary Committee was similarly bypassed at that time. The Warner Amendment was never submitted to and has never been considered by this Committee.

So far as I am aware, three judicial decisions to date have applied the Warner Amendment to pending actions for damages arising out of the United States' atomic weapons testing program. Those decisions are a First Circuit Court of Appeals decision in Hammond v. United States, No. 85-1339 (1st Cir., March 12, 1986); a District Court decision in San Francisco in In re Consolidated Nuclear Radiation Injury Litigation, No. C-84-0022-WWS (N.D. Cal., August 28, 1985); and a District Court decision in Nevada in Prescott v. United States and consolidated cases, Civil LV 80-143 RDF (D. Nev., September 19, 1985). In the First Circuit case the widow of a civilian employee of the Defense Department and observer at several atomic weapons tests sued a private contractor involved in the testing program. The United States intervened as a defendant, was substituted for the contractor under the Warner Amendment, and successfully moved for dismissal of the suit. In the San Francisco cases, plaintiffs in 43 consolidated actions sued the United States and several private contractors. Plaintiffs included both veterans and civilians who had been exposed to radiation during the atomic weapons testing program. The United States was substituted for the private contractors under the Warner Amendment, and successfully moved for dismissal. In the Nevada cases, the

plaintiffs sued the United States and several private contractors. The United States was substituted for a private contractor under the Warner Amendment in one of the cases, and successfully moved for dismissal. The District Court then invited the United States to move for intervention and dismissal in the other cases.

In all three decisions, the dismissal of the United States was based on doctrines of sovereign immunity. If the United States is sued directly by a civilian, it is immune from liability if its actions fall within the "discretionary function" exception to the Federal Tort Claims Act, 28 U.S.C. §2680(a). If the United States is sued directly by a veteran for injuries occurring during military service, the suit is entirely barred by the Feres doctrine, Feres v. United States, 340 U.S. 135 (1950). Neither the "discretionary function" exception nor the Feres doctrine is available as a defense to private defendants such as contractors. Thus, the United States under the Warner Amendment was permitted to substitute itself as a defendant in place of private contractors, and then to assert defenses not available to those contractors.

The United States' intervention and subsequent dismissal had two important consequences. First, most important to the plaintiffs, the plaintiffs were precluded from any judicial remedy for injuries or death due to exposure to radiation in the course of the atomic weapons testing program. Second, most important to the private contractors and perhaps to the government as well, the suits were dismissed before any discovery was permitted and, necessarily, before any evidence of what actually occurred was presented in open court. In other words, the early dismissal of these cases enabled the contractors and the government to shield from judicial inquiry and from public scrutiny the facts behind these cases.

II. Constitutional And Policy Problems Under Existing Law

The Warner Amendment is an unusual law in several respects. First, it effectively provides that private contractors shall have all the sovereign immunity defenses of the United States in suits arising out of the atomic weapons testing program. Such immunity has been provided to private parties in the past, but only to individuals employed by the United States. Only two classes of Government employees have ever been given such protection: drivers of motor vehicles and health care providers. 28 U.S.C. §2679(b)-(e) (see Carr v. United States, 422 F.2d 1007 (4th Cir. 1970)) (Federal Drivers Act); 10 U.S.C. §1089 (Armed Forces health care providers); 22 U.S.C. §817 (Foreign Service health care providers); 38 U.S.C. §4116 (Veterans Administration health care providers); 42 U.S.C. §233 (Public Health Service health care providers).

Only once has a government contractor been protected by the United States being substituted as the defendant. This protection was provided to vaccine manufacturers and providers under the Swine Flu Act. 42 U.S.C. §247b (revised and in pertinent part repealed by Pub. L. 95-626 (1978)) (see Ducharme v. Merrill-National Laboratories, 574 F.2d 1307 (5th Cir.), cert. denied, 439 U.S. 1002 (1978)). But it is crucial to note that while the United States stepped in as the defendant under the Swine Flu Act, its liability was determined under essentially the same substantive law as that applicable to the private defendants. 42 U.S.C. §247b(k)(2)(A). That is, the United States was not permitted under the Swine Flu Act to assert the sovereign immunity-based defenses available to it under the Federal Tort Claims Act. In this important respect, the operation of the Swine Flu Act is fundamentally unlike the operation of the Warner Amendment.

Second, the Warner Amendment operates retroactively. It is explicitly made applicable not only to events that took place

before its passage, but even to cases that were actually pending in court at the time of its passage. 42 U.S.C. §2212(c). By contrast, the Swine Flu statute -- the only other law substituting the Government in the place of independent contractors -- was explicitly made prospective, applying only to causes of action arising after its passage. Moreover, none of the statutes providing the sovereign immunity shield to Government employees appears to operate, or to have operated, retroactively. Several explicitly provide for prospective operation. Other, older statutes are silent on the issue, leading me to conclude that they operated in the normal fashion of statutory enactments -- which is to say, prospectively.

Third, the effect of the Warner amendment is to require that suits against the United States arising out of the atomic testing program shall be to a judge rather than to a jury. The consequence may be illustrated by reference to a federal court action brought prior to the amendment. Such an action would be a common law action against a private defendant, and the Seventh Amendment to the Constitution would guarantee a jury trial on all factual issues. But the Warner Amendment would transform this litigation into a suit against the Government under the Federal Tort Claims Act, and all issues of fact in Tort Claims cases are tried to a judge rather than a jury. The Warner Amendment thus has the consequence of depriving the litigants of their Seventh Amendment right to a jury trial because of the substitution of the United States for the contractor defendant.

Finally, the Warner Amendment appears to provide no substantive protection to the contractors' financial interest that was not already provided. As I understand it, all of the contractors affected by the Warner Amendment had indemnification agreements under which the United States had agreed to reimburse them for damage judgments and costs of defense resulting from suits arising out of the atomic testing program. Thus, even without the amendment, the contractors would have been held harmless in the event of a judgment against them.

The unusual nature of the Warner Amendment has led me to question whether Congress was aware of what it was doing when the amendment was passed. The strength of my question is reinforced by passages from the legislative history of the amendment. The House Committee on Armed Services in 1983 and the Senate Committee on Armed Services in 1984 both described the amendment as facilitating coordination of suits and uniformity of outcome by permitting "the consolidation of these many cases under the leadership of the Department of Justice, with the United States as a co-defendant" (emphasis added). H. Rep. No. 124, 98th Cong., 1st Sess. 29 (1983); S. Rep. No. 500, 98th Cong., 2d Sess. 374 (1984) (identical wording). If the consequence of the amendment were to permit the United States to enter a suit merely as a co-defendant, I would not be here today. But the amendment has been construed to permit the United States to be substituted as the sole defendant, thereby eliminating the contractors entirely from any suit.

Further, the Conference Committee Report on the bill that was finally passed described the amendment as follows: "This section would provide a remedy against the United States for injury, due to loss of property, personal injury, or death due to exposure to radiation emissions by a contractor carrying out atomic weapons tests under a contract with, and under the direction and control of, the United States" (emphasis added). H. Conf. Rep. No. 1080, 98th Cong., 2d Sess. (1984). With all due respect, I must say that I consider this language misleading. The amendment does not "provide a remedy." Rather it takes away a remedy previously available against private contractors. The remedy "provided" against the United States is, in almost all cases, illusory because of the sovereign immunity-based defenses available to the United States.

I find it difficult to believe that the Warner Amendment was passed by Congress in the exercise of its considered judgment. I feel this way in part because of the legislative history I have just recited. But I feel this way in most important part because

of serious and fairly obvious questions about the constitutionality of the amendment. I do not mean here to advance all possible constitutional arguments against the amendment, but I do wish to discuss two constitutional issues of particular concern. They are the retroactive application of the statute, particularly as it relates to separation of powers, and the deprivation of a jury trial.

Constitutional Issues

Retroactive Application: Taking and Separation of Powers

Statutes have, on occasion, been applied retroactively, but for obvious reasons this is an undesirable and disfavored way for legislation to operate. I am unaware of any statute precisely comparable to the Warner Amendment having been given retroactive operation. An examination of the manner in which the Warner Amendment operates will reveal the constitutional difficulties that are inescapably presented.

We should begin by understanding at the outset why retroactive legislation is disfavored. One reason is the rationale behind the constitutional prohibition against ex post facto laws. The objection lies, in Dean Ely's words, in "attaching untoward [and, I would add, unforeseen] consequences to an act performed before [the statute] was enacted." J. Ely, Democracy and Distrust 91 (1980).

But the vice of retroactive application goes beyond the violation of expectation inherent in the lack of warning of consequences that will be attached to one's conduct. It goes, in addition, to the danger that legislation can be used to the advantage or disadvantage of particular, identifiable groups. Prospective legislation operates fairly for all people in the sense that people potentially subject to the legislative command are identifiable, if at all, only be predicting the behavior of

those people. Retroactive legislation, by contrast, permits the legislative body to identify people whose conduct has taken place, and to penalize or reward precisely those people. In other words, retroactive legislation potentially offers to the legislature a tool by which, under the guise of facially neutral commands, it may penalize or reward easily identifiable people or groups whose conduct is complete.

Finally, when the retroactive legislation applies not only to past conduct but also to pending lawsuits, yet another objection is necessarily raised. Our government is built upon the principle of separation of powers. Subject only to the veto power of the President, Congress is responsible for the enactment of our statutes. And the federal courts are responsible for the application of these laws in cases properly brought before them. When a case is pending before a court under a particular law, Congress -- sensing a result it may not like -- should not be able at this late stage to change the law. If it attempts to do so, Congress is stepping outside its proper sphere.

The Warner Amendment is undesirable and potentially unconstitutional retroactive legislation in all of the respects outlined above. There are several doctrinal categories under which one might attack the retroactive application of the amendment, two of which I regard as particularly worthy of attention.

First, the deprivation of an accrued cause of action may constitute a "taking" for which compensation must be paid. The Supreme Court has repeatedly indicated that accrued causes of action constitute property for purposes of the taking clause. For example, in Armstrong v. United States, 364 U.S. 40, 46-49 (1960), the Court held that the action of the United States had the consequence of destroying the value of plaintiff's materialmen's liens under State law, and that this action constituted a taking for which compensation was due. As recently as 1981, the Supreme Court sustained the power of the President

to suspend private causes of action against the Government of Iran. But even here, where the Executive power over foreign relations was at stake, the Court pointedly noted that the question of "taking" those causes of action was not before it: "Though we conclude that the President has settled petitioner's claims against Iran, we do not suggest that the settlement has terminated petitioner's possible taking claim against the United States." Dames & Moore v. Regan, 453 U.S. 654, 689 n.14 (1981). See also Richmond Screw Anchor Co. v. United States, 275 U.S. 331 (1928); Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982). In the situation now before us, significant numbers of people injured or killed by radiation had accrued causes of action against private contractors. The consequence of the Warner Amendment has been to make these causes of action worthless. Under the precedents of the Supreme Court, I think the Warner Amendment very possibly constitutes an unconstitutional taking.

Second, in the particular circumstances presented by the Warner Amendment, the amendment violates the principle of separation of powers because its passage was prompted by, and it was specifically made to apply to, pending suits. I regard this argument as the most powerful of all the constitutional arguments against the Warner Amendment.

Legislation purporting to change the rule of decision while a case is sub judice has always been very troublesome. The fountainhead case is United States v. Klein, 80 U.S. (13 Wall.) 128 (1871), in which Congress sought to prevent Southerners who had participated in the Civil War from relying on a Presidential pardon to show their right to a restoration of their property. In a difficult and ambiguous opinion, the Court struck down the statute by which Congress sought to achieve its end, saying, among other things, that Congress had tried "to prescribe a rule for the decision of a cause in a particular way." 80 U.S. (13 Wall.) at 146. The present Supreme Court has characterized Klein

as holding the statute unconstitutional because, inter alia, "it prescribed a rule of decision in a case pending before the courts, and did so in a manner that required the courts to decide a controversy in the Government's favor." United States v. Sioux Nation of Indians, 448 U.S. 371, 404 (1980).

In the situation now before us, it is clear that by the Warner Amendment the United States has done precisely what Klein and Sioux Nation say it cannot do. It has changed the rule of decision in cases pending before the courts, and it has done so in a manner that requires a decision in its favor. The rule has clearly been changed in pending cases: the United States is substituted as a defendant and is then permitted to assert defenses previously unavailable against the plaintiffs. Moreover, this consequence is not an incidental side effect of a statute passed for other reasons. The very purpose of the Amendment was to interfere with pending suits. As Deputy Assistant Attorney General Robert Willmore testified before the House Subcommittee of the Judiciary Committee during hearings on the Boucher bill, "[I]t was as a result of the development of these lawsuits, particularly the very large growth in this litigation in California, that brought the contractors and the administration to Congress, and that necessitated some congressional action; section 1631 [the Warner Amendment] was the result." "Litigation Relating to Atomic Testing," Hearings Before the Subcommittee on Administrative Law and Governmental Relations of the Committee on the Judiciary, 99th Cong., 1st Sess. 155 (October 2 and 3, 1985).

It is also clear that the change effected by the Warner Amendment works in the United States' favor. If the private contractors had been forced to rely only on the defenses available to private defendants and had suffered judgments against them, the United States would have been obliged to hold them harmless under their indemnification agreements with the contractors. But the Warner Amendment permits the United States to step into pending suits and to assert previously unavailable

defenses, thereby protecting its contractors (and therefore itself) from liability. This result certainly seems odd, and I would say unfortunate, from the standpoint of public policy. In my view, the Klein case, particularly as construed in Sioux Nation, compels a conclusion that the result is also unconstitutional.

Both the Court of Appeals for the First Circuit and the District Court for the Northern District of California have concluded that the Warner Amendment is constitutional. Hammond v. United States, No. 85-1339 (1st Cir., March 12, 1986); In re Consolidated Nuclear Radiation Injury Litigation, No. C-84-0022-WWS (N.D. Cal., August 28, 1985).1/ But the First Circuit did not consider the Klein and Sioux Nation separation of powers problem posed by the fact that the Warner Amendment was specifically intended to change the legal rule in pending cases, and to do so to the advantage of the government. Rather, it assumed, incorrectly, that the Constitutional issues posed were no different than those posed by the Swine Flu Act. Hammond, manuscript op. at 10. The District Court in San Francisco treated the Klein case only briefly, and concluded, incorrectly, that the Warner Amendment had ample precedent in statutes such as the Swine Flu Act. Consolidated Nuclear Radiation Injury Litigation, manuscript op. 20-1, 10-11 ("In adopting this legislation, Congress broke no new ground.").

Jury Trial

In addition to my conclusions about the constitutionality of the retroactive application of the statute, I also have substantial doubts about the deprivation of jury trial that results from the Warner Amendment. The Seventh Amendment to the

1/ The District Court for the District of Nevada issued an order without opinion. Its implicit conclusion is also that the Warner Amendment is constitutional, but the order did not give any evidence that the court had considered the constitutional issues. Prescott v. United States, et al., Civil LV 80-143 RDF (September 19, 1985).

Constitution provides, "In suits at common law...the right of trial by jury shall be preserved...." U.S. Constitution, Amend. VII. The Supreme Court has consistently read the Amendment expansively to require jury trials even where that mode of trial is awkward or inconvenient. As the Court stated in Jacob v. New York, 315 U.S. 752, 752-3 (1942), "The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment...[and] should be jealously guarded by the courts."

If the suit were simply between the injured plaintiffs and the private contractors, there can be no question that the Seventh Amendment would require a jury trial. The issue posed by the Warner Amendment is whether the device of substituting the United States as a defendant can constitutionally have the consequence of depriving plaintiffs of that right.

There is only one other federal statute that has the same consequence for jury trial as the Warner Amendment.2/ That is the Swine Flu Act, which substitutes the United States as defendant for private manufacturers and distributors of the Swine Flu vaccine. The Court of Appeals for the Fifth Circuit has found that the denial of jury trial is constitutional. Ducharme v. Merrill-National Laboratories, 573 F.2d 1307 (5th Cir.), cert. denied, 439 U.S. 1002 (1978). But the court of appeals wrote no opinion in the case, and merely appended the district court's opinion to its one-sentence per curiam order. The district court concluded in one paragraph that the Seventh amendment jury trial right is not invoked when the sovereign consents to suit, since the sovereign "may attach any conditions (including no right to trial by jury) to its consent." 574 F.2d at 1311.

2/ The statutes under which the United States steps in as defendant when its own employees are sued present quite different jury trial issues. By analogy to respondeat superior, the employees of the sovereign may be seen as sufficiently closely identified with the sovereign that a suit against the employees may be regarded as a suit against the sovereign for purposes of the jury trial guarantee.

I confess that I am unconvinced by the district court's rationale in the Ducharme case. It is unquestionably true that the United States need not consent to trial by jury when it waives its sovereign immunity and consents to suit. But the question here is whether, when the United States seeks to interpose its sovereign immunity defenses in order to protect a private defendant, it may deprive a plaintiff of a jury trial. Such a question has never been presented to the Supreme Court, and I suspect that the Court would take the jury trial question much more seriously than did the Ducharme court. My own opinion is that the deprivation of jury trial by the Warner Amendment stands a very good chance of being held unconstitutional if and when the question is ever presented to the Supreme Court.

I thus regard both the retroactive application of the Warner Amendment and the denial of jury trial effected by the Warner Amendment as vulnerable to serious constitutional challenge. I note that my opinion on both these issues was shared by the full Judiciary Committee of the House of Representatives in 1981 when the Committee reported adversely on the identical predecessor bill to the Warner Amendment. On the retroactivity question, the Committee wrote, "The Committee is concerned that Section 213 would eliminate property interests in pending causes of action in violation of the Fifth Amendment." On the jury trial question, the Committee wrote, "To eliminate the right to trial by jury in cases against these contractors would violate the Seventh Amendment." H. Rep. 134, 98th Cong., 1st Sess. 5 (1981) (Adverse Report).

Policy

As a matter of policy, if I may briefly address that issue separately from the constitutional issues, I regard the Warner Amendment as profoundly misguided. Sovereign immunity has long

[illegible] regarded as, at least, a necessary evil. During this century, Congress has not been as sovereign immunity as it has once [illegible] to regard it as [illegible] and increasingly more evil.

Academic commentators of various political persuasions have been uniformly hostile to the [illegible] of sovereign immunity. Professor Borchard of Yale set the tone for much of our thinking about sovereign immunity in the 1920s. Borchard, Government Liability in Tort, 34 Yale L. J. 1, 129, 229 (1924). And contemporary legal scholars such as Professor Shapiro of Harvard and Professor Davis of Chicago continue to find the doctrine troublesome and largely unfounded. See, e.g., Shapiro, "Common-Sense Suits: The Standard Assumed and the Revolution Case," 80 Harv. L. Rev. 91, 92 (1966) ("[T]he doctrine in its more blatant form is at war with the principle that government must be accountable to the people through the courts."); Davis, "Sovereign Immunity and Suits against Government Officers," 1969 Sup. Ct. Rev. 149, 168 ("Sovereign immunity is an unprincipled doctrine that does not belong in an enlightened society.").

In certain circumstances, sovereign immunity continues to be a necessary evil. A doctrine that prevents the government in suits not its proper purposes without fear of crippling [illegible] reducing money from having performed its governmental functions. I confess, however, that I am unable to see what important purposes is served by preserving the United States in assert its sovereign immunity to prevent its participation in suits. If the aim is to prevent the unnecessary from [illegible] that is already accomplished by the [illegible] between the United States and consistency. And the aim of the Tucker Amendment should not be to permit the United States to avoid paying its [illegible] but to permit the United States -- by promoting its participation from judgments to which [illegible] -- to [illegible].

There is an additional, very troublesome policy problem with the Warner Amendment. The effect of the amendment is to force dismissals of lawsuits at the outset. This has the consequence of preventing judicially sanctioned discovery of what actually happened during the atomic weapons testing program, and it has the further consequence of preventing the plaintiffs from presenting evidence in open court of what happened. One suspects that the contractors and the government are seeking to avoid the embarrassment that these lawsuits will cause them. A less polite way of putting it is to say that the Warner Amendment helps to perpetrate a cover-up of what happened during the atomic weapons testing program.

As we have been reminded in recent weeks, secrecy concerning nuclear accidents and injuries is a way of life in some societies. In our country, such secrecy is contrary to our most basic and cherished principles. In the past, Congress has frequently protected the country from cover-ups and government secrecy, but it appears that Congress may have participated unwittingly in a cover-up in passing the Warner Amendment.

In summary, I regard the Warner Amendment as seriously flawed. There are serious grounds to believe that it is unconstitutional. And there are substantial arguments against it from a policy standpoint. I therefore regard S. 2454 as a very promising proposal. In the following section I will compare S. 2454 and the Boucher bill (H.R. 1338), and recommend that S. 2454 be adopted.

III. S. 2454 and H.R. 1338

S. 2454 would repeal the Warner Amendment outright. It would eliminate at a stroke the constitutional and policy objections I have discussed above. The repeal of the Warner Amendment would not necessarily make the government's contractors liable to those

injured in the atomic weapons program. But it would permit those who have been injured to present the merits of their claims to courts of competent jurisdiction. These victims would not get special treatment. They would only get to exercise the ordinary right of private litigants -- the right to present their claims for legal determination on the merits of those claims.

The Boucher bill, H.R. 1338, would serve many of the same purposes as S. 2454. It would continue to allow substitution of the United States for contractors in actions arising out of the atomic weapons testing program, but it would make available to the United States only those defenses that would be available to contractors in such an action. In this way, the bill would operate in the same way as the Swine Flu Act. Thus, the government would not be able to rely on limitations on its waiver of sovereign immunity, such as the discretionary function exception of the FTCA or the Feres doctrine, to obtain dismissal of actions brought against private contractors. In addition, the bill would provide for a right to jury trial at the request of any party to the action. The bill would, however, eliminate the possible recovery of punitive damages and would eliminate prejudgment interest on damage awards.

It bears emphasis that neither S. 2454 nor H.R. 1338 would guarantee that participants in the atomic weapons testing program, even those participants who could prove they were exposed to unsafe levels of ionizing radiation, would necessarily recover any compensation. All that bill would do is allow such claimants the opportunity to prove that their injuries were in fact caused by contractors' negligence. Claimants would still face the extremely difficult hurdles of proving that government contractors failed to exercise due care in light of then-current knowledge of the hazards of radiation exposure, and that such unreasonable acts or omissions proximately caused their injuries, often some 20 or 30 years later. If a given plaintiff were unable to prove that a contractor was responsible for failing to take adequate protective measures, for example, or that the

failure was the actual medical cause of his cancer, he would be unable to recover any damages.

S. 2454 and H.R. 1338 would only affect those actions originally brought against government contractors, and not against the Government itself. Neither bill says anything about the Government's ability to raise defenses such as the discretionary function exception and the Feres doctrine in actions originally brought against it, and that ability would be unimpaired. The bill thus would afford a potential right of recovery only to those test participants who could prove their injuries resulted from negligence on the part of private contractors. Those test participants whose exposure to radiation was intentionally or negligently caused by military or AEC actions would not be benefited at all. Both bills fall short of a comprehensive compensation scheme for all participants, military and civilian, who were exposed to radiation in the atomic weapons testing program and who contracted radiation-related diseases or died as result of that exposure. But either bill would represent a small but important step toward that goal.

In the end, I think outright repeal of the Warner Amendment is the better of the two alternatives. The amendment singles out for special adverse treatment civilians and veterans who have served their country with selflessness and devotion. It changes the law without notice and in mid-trial so that it now works against these men and women in a wholly unforeseen way and it changes the law in a way wholly inconsistent with American traditions of fair play and justice. Outright repeal of the Warner Amendment is the best way to eliminate the constitutional and policy problems I have just described. And repeal is necessary if the United States wishes to say clearly to its civilians and veterans, and to the world, that our country treats its citizens fairly and honestly.

Senator MCCONNELL. Thank you, professor.
Mr. Egan.

STATEMENT OF PAUL S. EGAN

Mr. EGAN. Thank you very much, Mr. Chairman. First of all, I am not an attorney. However, as someone who has been involved in the development of legislation to compensate through the Veterans' Administration——

Senator MCCONNELL. You might pull that mike a little closer to your voice, sir. I am having a hard time hearing you.

Mr. EGAN [continuing]. Both radiation and dioxin exposed individuals, I think I can speak to some of the questions that were raised here earlier, particularly by Senator Simon.

I think it is important to note, first of all, that this is not a hearing about what kind of compensation system is most appropriate. Furthermore, this is not a hearing about whether or not the VA has been remiss in its adjudication of radiation claims. This is not an issue of whether or not the merits of these claims are legitimate. And certainly it is not a matter of whether possible liability is so great as to obviate a desire for this kind of legislation.

What is at issue here is whether or not the veterans involved in these suits were unfairly deprived of a right to legal recourse prior to the Warner amendment. That is the issue. We can talk all day long about what kinds of exposure caused what kinds of disorders. We can talk all day long about whether or not the VA has appropriately adjudicated that 1 percent of the claims that it has accepted, but that is not the issue here today.

We believe that the answer to the question about whether or not those veterans were unfairly deprived of a legal right is, yes, they were unfairly deprived. First of all, the Government and the contractors involved entered into contracts, freely and openly. Those contracts contained indemnification clauses. The fact that there were indemnification clauses is a concession on the part of the Government that some sort of negligence was predictable, and that some sort of responsibility to shoulder the cost of that negligence was accepted by the Government.

Second, the Feres doctrine holds essentially that no veteran can sue the Federal Government. However, it is not an absolute bar to suing of the Federal Government, as pointed out by the previous witness. The right to sue the Federal Government in cases of negligence apparently has existed for a very long time.

So, to deprive these veterans of the recourse that they were pursuing at the time the Warner amendment was adopted is again not fair, and this is as it should be because veterans, as I think everyone knows, are a special category of individual in terms of their vulnerability. Military people are subject to orders and if they do not follow those orders they are subject to various stages of sanctions. So they are especially vulnerable.

Now, if alleged contractors actually did, as found in some court of law, either by act or omission, establish some situation where veterans were overexposed, the Feres doctrine should not apply.

Finally, it was an unfair removal of a right to redress because of the way in which the Warner amendment was approved. It was ap-

proved as part of a defense authorization. It was approved in the closing days of a session; as such, it deprived both this committee and the House Judiciary Committee of adequate oversight.

Two years prior to adoption of the Warner amendment, the House Judiciary Committee submitted an adverse report on legislation similar to the Warner amendment which suggests to me very strongly that if the Warner amendment were before this committee prior to its adoption, it would not have been able to stand on its own merits.

The Government argues that the United States ought to be responsible, that the activity was essentially governmental. We agree with that. That is true. However, the argument is self-serving because when the Government makes that argument, it knows very well that when you substitute the U.S. Government for the name of the contractor in any pending suit, the Feres doctrine makes all of those suits vulnerable to be thrown out of court, which is exactly what happened.

There are two pieces of legislation before the committee today. One of them was passed by the House of Representatives. This measure would maintain the Warner amendment's substitution of the U.S. Government but would deny the Government any defenses that were otherwise unavailable to the individual contractors.

If this committee is concerned about leaving the Feres doctrine essentially undisturbed, while simultaneously leaving the Federal Tort Claims Act undisturbed, then it seems to us that S. 2454 is the most reasonable way of doing that, while simultaneously providing these veterans with a restoration of a right that never should have been withdrawn.

That concludes my statement.

Thank you.

[The prepared statement of Mr. Egan follows:]

Statement of

The American Legion

1608 K STREET, N. W.
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by

PAUL S. EGAN, DEPUTY DIRECTOR
NATIONAL LEGISLATIVE COMMISSION
THE AMERICAN LEGION

Mr. Chairman and members of this committee, The American Legion appreciates this opportunity to present its views on the general subject of the "Warner Amendment" and legislation to rectify its consequences. In that regard, we wish to recognize Senator Warner at the outset as an original cosponsor of legislation, S. 2454, to do just that. The action by Senator Warner in joining the other original cosponsors of this measure to repeal his own amendment constitutes the sort of political courage and respect for sound public policy that exemplify the best characteristics of any public servant here in Washington.

It is our understanding that in reviewing legislation to address the problems created by the "Warner Amendment", this hearing is intended to examine the Feres Doctrine and the Federal Tort Claims Act in hopes of finding the most appropriate means to satisfy the allegedly disabled veterans involved without compromising sound principles of good public policy. In this statement, The American Legion hopes to contribute to your efforts at finding an equitable solution offering the veterans involved an opportunity to resume the court actions already undertaken prior to adoption of the "Warner Amendment" to the Defense Authorization Act of 1984, P.L. 98-525.

In supporting a restoration of the legal recourse previously available to these ionizing radiation-exposed veterans, we believe it is important to avoid any blending of related yet distinctly different issues. The question to be answered is whether or not the "Warner Amendment" unfairly deprived the veterans involved of their then existing avenues of legal recourse against contractors allegedly negligent by acts or omissions in either warning the federal government of the radiation exposure dangers to service members participating in nuclear experiments or failing to provide existing safety precautions. The issue is not a question of what system of compensation best fulfills

the government's obligations to injured military personnel. Neither is the question one of whether or not VA has been remiss in fulfilling its obligations to radiation-exposed veterans as prescribed by the Veterans Dioxin and Radiation Exposure Compensation Standards Act of 1984, P.L. 98-542. This issue is also not a question of whether the merits of the claims of some radiation-exposed veterans are so compelling as to warrant court action against either the federal contractors having participated in the atmospheric nuclear tests in question or the federal government. Finally, and perhaps most importantly, this issue ought not to be one of whether the potential dollar liability is too high during times of fiscal austerity to justify restoration of a pre-existing right to due process.

In some quarters we have heard it argued that veterans, by virtue of their service to the nation, have no business seeking legal damages from contractors, because the VA system of compensation was expressly established for the purpose of compensating any veteran able to establish within reasonable doubt that his or her disability is service-related. This argument, however, ignores the fact that a right to legal recourse has coexisted with the VA compensation system, in part because of indemnification clauses in the contracts freely entered into by the nuclear contractors and the federal government. The fact that the government entered idemnity agreements contemplated that negligence was foreseeable and that liability for negligence was also foreseeable.

While we understand the VA compensation system is a means for the government to accommodate its responsibility for the injuries sustained by service personnel, it has never existed for the purpose of according compensation to veterans injured specifically as a result of negligence. Instead, it has been and remains a system to compensate injured veterans for lost earning power irrespective of circumstances surrounding individual classes of injury. As such, the VA compensation system represents the taxpayers' gratitude to individuals having served the nation in uniform, but who unfortunately were disabled during military service.

This agreement also ignores the very real possibility that even though an injury was sustained while on active duty, the injury itself, in the absence of negligence by a federal contractor, might have been avoided. If negligence by a contractor has caused the disability of a service member, as determined by a court of law in a case brought by atomic veterans under the auspices of contract indemnification agreements between contractors and the federal government, the co-existence of VA's compensation system ought to be irrelevant.

Those arguing against a judicial option for atomic veterans also point to the

Feres Doctrine. As we understand it, the Feres Doctrine holds that no veteran may sue the federal government for any injury sustained on active duty. While we are not prepared to comment on the specifics of the case from which the Feres Doctrine emanated, we can appreciate its desirability from the standpoint of protecting the government from tort liability, given the necessity of sending military personnel into hazardous duty.

However, the broadness of the Feres Doctrine is so sweeping as to protect the government from all liability regardless of the circumstances and, in this instance, regardless of potentially wrongful intervention by nongovernmental entities. In a post "Warner Amendment" climate where the Feres Doctrine is applied even though federal contractors may have been negligent in failing to provide for the best possible safety precautions or misled the government as to the severity of the radiation exposure danger, we must conclude that the Feres Doctrine is too broad to be completely free of misapplication. Under the best of circumstances, military personnel are in a special status of vulnerability. When they are ordered to carry out specific duties they must comply or face a range of serious sanctions. Since military personnel normally comply with little or no hesitation, their susceptibility to serious risk is far greater than for nonmilitary persons who may simply terminate employment rather than face hazardous circumstances.

Two years prior to the adoption of the "Warner Amendment" (which was cleared during the extremely hectic closing of the 98th Congress) the House Judiciary Subcommittee on Administrative Law and Governmental Relations reviewed similar legislation that had been sequentially referred. As a result of this review, on June 15, 1983 the House Judiciary Committee issued an adverse report citing several reasons it opposed this legislation. These included, "(1) The amendment would be grossly unfair to both current and potential plaintiffs, (2) since tort claims are tried without a jury under the Federal Tort Claims Act, the amendment would deprive claimants of a jury trial, even though the right to a jury trial attaches in pending cases, (3) the amendment would eliminate property interests in pending causes of action in possible violation of the 5th Amendment, and (4) the amendment would immediately deprive some plaintiffs of any action and would seriously and detrimentally affect the procedural and substantive rights of other plaintiffs." In this year's House Judiciary Committee report favorably recommending adoption of remedial legislation, H.R. 1338, correcting the earlier foreseen problems of the "Warner Amendment", it is stated that, "Thus, the real effect of the Warner Amendment is to leave the harmed individual with no remedy at all."

In essence, the claims of those veterans having brought actions against contractors prior to the "Warner Amendment" were vitiated by the simple substitution, in

the Amendment, of the United States Government for the name of the contractor identified in the legal action. This simple substitution made all of these pending actions vulnerable, as earlier predicted by the House Judiciary Committee, to the Feres Doctrine.

Given the fact that the "Warner Amendment" was added to the Defense Authorization Act of 1984, in the extremely pressured climate attending the close of a congressional session, both House and Senate Judiciary Committees were effectively denied their proper jurisdictional review of the amendment prior to enactment. Moreover, the circumstances allowed this amendment to simply slip by without notice until it was too late. We believe this amendment could never have withstood the test of proper congressional scrutiny on its own merits.

In its approach to the problem this year, the House has passed H.R. 1338. This bill retains the "Warner Amendment" provision that substitutes the United States Government for the name of the contractor identified in a suit, but reverses that part of the Amendment giving the United States Government access to all of the defenses under the Federal Tort Claims Act. In doing so, this adjustment also denies the federal government the sweeping protection of the Feres Doctrine and allows the federal government only those defenses that were available to contractors before enactment of the "Warner Amendment".

This approach to remedying the consequences of the "Warner Amendment" appears to be carefully constructed to provide an equitable solution without tampering with the Feres Doctrine. This approach also appears to afford a solution without disturbing the Federal Tort Claims Act by denying the federal government any defenses other than what would have been available to contractors. If, in this committee's view, it is desirable to preserve the Feres Doctrine and to protect the Federal Tort Claims Act from increases in litigation that might stem from the precedent set by adopting H.R. 1338, this particular solution is an imperfect one. On the other hand, in the absence of a better solution prior to introduction of S. 2454, the Legion supported the House bill.

On May 15, 1986 Senators Murkowski, Warner, Simon, Cranston, DeConcini and Denton introduced S. 2454. This legislation represents a different solution of similar merit. The Senate measure would simply repeal the "Warner Amendment" effectively restoring circumstances to their original state prior to enactment of the "Warner Amendment". Like the House passed remedial legislation, the Senate bill leaves the Feres Doctrine undisturbed while also restoring an avenue of recourse to the affected veterans. Unlike the House bill, the Senate measure completely protects the Federal Tort Claims Act from the risks of added litigation arising from the precedent H.R. 1338 might cause.

From a practical standpoint, an important difference between the two measures is the identification of the party named in individual legal actions brought by aggrieved veterans. In the House bill, it would be the federal government and in the Senate bill it would be the allegedly negligent contractor. Under actual court circumstances, we are advised that the Senate bill would be preferable to veterans, because contractors might be more inclined than the federal government to offer a settlement rather than pursue a lengthy and potentially expensive legal conclusion.

On the question of which of these remedies is most appropriate, the Legion has no view to express. Our interest is limited to concerns of equity. We believe a legal right pre-existing the "Warner Amendment" was unfairly withdrawn. Therefore, we urge this committee to move forward as quickly as possible with one of these options so that any differences between House passed and hopefully Senate passed legislation can be ironed out in conference committee prior to the conclusion of the 99th Congress.

Assuming the committee agrees to one of these legislative options, we further recommend that serious consideration be given to additional language to restore time lost to veterans because of the "Warner Amendment". The additional time would compensate for the time lost to veterans who might no longer be permitted to bring suits due to statutes of limitations.

For its part, the Administration appears to oppose any restoration of pre-existing rights to legal recourse. In testimony presented to the House Judiciary Subcommittee on Administrative Law and Governmental Relations, witnesses from the Department of Justice stated, "The Administration opposes enactment of H.R. 1338 because Section 1631 is a fair and reasonable means of accepting federal responsibility for the litigation arising out of the atomic weapons testing program -- a quintessentially federal activity. Moreover, H.R. 1338 provides preferential relief to a special class of litigants and would represent a most unwise and undesireable precedent for Congressional action with respect to tort claims against the United States."

In making this argument the Administration makes two points. The first of these is that radiation exposed veterans should be subject to the Federal Tort Claims Act which sets out criteria for litigants against the United States. The Department of Justice, in making this point, stresses that any negligent acts or omissions by nuclear test contractors must be assumed to be the responsibility of the United States since the federal government authorized and participated in the tests. In stressing that responsibility for negligence, in this rather circular argument must be shouldered by the federal government, the only recourse that ought to be allowed is under the auspices of the Federal Tort Claims Act. Conveniently, this law, under which veterans would be subject to the Feres Doctrine, would bar all negligence suits by veterans against the

government regardless of merit and regardless of actual negligence by contractors. This argument ignores the contractual obligations the government freely entered into with nuclear contractors. Those obligations, in this instance, reflected by indemnification clauses, provided that the government would pay the costs of court judgments against negligent contractors.

True it is, the government is ultimately responsible for negligent acts or omissions by contractors performing essentially government activities. This much is evident from the government's willingness to enter into contracts containing indemnification clauses. However, for the government now to say that it is responsible for the sole purpose of freeing itself from all liability by subjecting atomic veterans claims to the Federal Tort Claims act is a cavalier abandonment of its obligations under contract.

The second point raised in the Justice Department's argument is that a dangerous precedent would be set by providing preferential relief to a special class of litigants. While the government makes a good point in being concerned about setting a precedent by adjusting the Federal Tort Claims Act, the government is totally silent on the question of what alternative would allow the government to perform its contract obligations and assume responsibility for veterans allegedly injured by contractor negligence without disturbing the Federal Tort Claims Act.

In summary, Mr. Chairman, the answer to the originally posed question of whether the government-requested "Warner Amendment" unfairly deprived veterans of their then existing rights to legal recourse against contractors is, in our judgment, yes. We further believe the application of the Feres Doctrine to deprive atomic veterans of the legal recourse they had prior to the "Warner Amendment" is evidence enough that this doctrine's sweep is too broad. To remedy the current problems caused by the "Warner Amendment", we urge this committee to move forward with legislation like either that passed by the House or that introduced in the Senate. Finally, we find the objections to remedial legislation offered by the Department of Justice earlier this year to be self serving.

Mr. Chairman, that concludes our statement.

Senator MCCONNELL. Thank you, Mr. Egan.
Mr. Haralson.

STATEMENT OF DALE HARALSON

Mr. HARALSON. Thank you, Mr. Chairman.

I would like to clarify, if I could, for the committee that this is not just a veterans' issue. This goes much further than the consequences of taking away the rights of veterans. The Warner amendment is an unprecedented and totally unwarranted infringement by the Congress on the constitutional rights of thousands of citizens for the benefit of a few corporations.

It is bad enough when the Congress of the United States can immune the Federal Government for negligently causing injury to its own citizens or the State can immune itself for negligently causing injuries to its own citizens. But here Congress is saying private corporations are immune from negligent acts not to be done in the future, but negligent acts that have already occurred and have already caused injury.

The Warner amendment takes away the rights of innocent injured citizens which had vested and which were in fact being litigated in the courts until the Warner amendment was passed. As to the thousands of soldiers, their wives, and their children, Warner guaranteed that they would be thrown out of court as soon as it was passed, with no chance of recovery, and that is in fact exactly what happened.

As to the citizens generally—and I am talking about citizens who were exposed to radiation, that were employed by contractors, I am talking about citizens who were in the area of the testing program, as to citizens generally, it abrogated their right to a jury trial for negligence against those contractors, it created new defenses and it made much more difficult the process of trying to seek recovery.

Another category that should be considered and I am one of the attorneys that represents are some 220 Nevada test site workers. The Warner amendment violates the 10th amendment by disrupting the workers compensation scheme that permits employees to sue their employers in a jury trial. Now, that is protected to the States. The State of Nevada had in place a workers compensation scheme and it provided that if the contractors did not have workers comp for radiation caused injury, then those employees were entitled to sue their contractors in a court of law before a jury. That is a right that exists in all States.

The Warner amendment and, as a matter of fact, Judge Foley, of the district court in Nevada, had determined that there was no workers compensation scheme in place for these test site workers' cases. The ninth circuit court of appeals had just affirmed Judge Foley's decision that the contractors did not have in place a workers comp scheme, and that the employees were entitled to sue the contractors for the radiation caused injuries, and within 175 days after the circuit court of appeals decision came down affirming the right to a jury trial, the Warner amendment was passed which abrogates that right to a jury trial under the Nevada State law. So that is another group of citizens whose rights were pulled out from under them while they were already in the judicial proceeding by

the Warner amendment. I would suggest that no one on this committee was aware that that litigation was even pending, much less the consequence of the Warner amendment on the rights of those 220 cancer victims that were pending in Nevada.

In addition to violating the 10th amendment, the due process clause of the 5th amendment is violated because it takes away vested causes of action that are already vested before the Warner amendment was passed. It violates the fifth amendment which provides for the equal protection of law for citizens because of the way of the discriminating effect that the Warner amendment has in its application. It discriminates between soldiers and civilians. It discriminates between soldiers injured by radiation and soldiers injured by private contractors by other means. It discriminates between citizens injured by radiation and citizens injured by other means. It discriminates between employees injured by contractors from radiation and employees injured by the same contractors by means other than radiation.

In addition to the fact that it is unconstitutional, there are policy considerations which warrant its repeal. There is already enough disparity between private citizens who have to take on the U.S. Government, the Department of Justice, the Department of Energy, and the contractors on one side, and the private citizen on the other, without having to add the Warner amendment which enhances that disparity.

Without the Warner amendment, scientists do not want to testify because they are afraid their funding is going to be cut off. The Department of Justice has unlimited lawyers. The Department of Justice and the Department of Energy have unlimited economic resources.

In the *Allen* case in Utah, the Department of Energy spent $6.3 million on one piece of evidence to be used against us in that case. That is the kind of resources the Department of Energy and the Department of Justice and the contractors have and now we adopt the Warner amendment and we add the Feres doctrine, we add for the contractors' benefit the discretionary function defense, we add the misrepresentation defense, we complicate discovery tremendously by substituting the Federal Government for the contractor. Why? Because if you do a request for production of documents legally, it is directed toward the defendant. The defendant needs to be the contractor, not the Federal Government.

If you notice the deposition of a critical witness and that witness works for a contractor and not for the Federal Government, the answer is we do not control him. See if you can locate him and subpoena him. If you submit interrogatories, they are designed to go to the defendant, but the defendant is now the Federal Government, not the contractor, so you get answers back from the wrong people, that did not have anything to do with it or that were not directly involved.

The discovery process, by substituting a fictitious defendant for the defendant who is actually involved in the transaction that caused the injuries, is complicating an already complicated situation tremendously and making it much, much more expensive. It is changing legal theories, it is changing defenses, and it takes away the right to the jury trial.

Certainly H.R. 1559 is desirable over the Warner amendment, but preferable would be to repeal the Warner amendment so that the litigation can be brought against the defendants that were responsible.

I realize that my time is up, but I would like to point out that as far as this particular legislation is concerned, it was costly, and is totally unnecessary. The contractors are indemnified. I am presently involved in a lawsuit in Utah where the Justice Department has taken over their entire defense. They are taking the contractor's lawyers, they are handling all of the discovery, but the contractors as of this date have not been indemnified. They are indemnified for costs, they are indemnified for any judgments, and it is totally unnecessary to take away the rights of the citizens of the United States to protect against the possible embarrassment or the possible inconvenience of multimillion-dollar corporations. I hope I never live to see the day that, in order to avoid embarrassment or inconvenience of a corporate defendant, the rights of individual citizens of the United States to a jury trial guaranteed by the seventh amendment of our Constitution is eliminated, and that is what we are doing here. I strongly urge that this be reconsidered and that the Warner amendment be repealed and the rights of these individuals, the veterans, the citizens, the civilian employees, and the contractor employees of the Nevada test site to a jury trial in the court system be restored, and if the contention did nothing wrong, then the courthouse is the place for them to vindicate themselves. They should not be hiding behind immunity that they can push through the Congress of the United States.

Thank you.

[The prepared statement and related material of Mr. Hamilton follow:]

STATEMENT OF DALE HARALSON

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE:

I am Dale Haralson, a partner in the law firm of HARALSON, KINERK & MOREY, P.C. in Tucson, Arizona. I am a Fellow of the International Academy of Trial Lawyers, International Society of Barristers, former vice president and present member of the Board of Governors of the American Trial Lawyers Association. I was the attorney who initiated Allen v. United States, 588 F.Supp. 247 (D. Utah 1984), and was responsible for preparation and trial in Salt Lake City, Utah in 1982. I have been asked to speak on behalf of those I represent as well as the National Association of Radiation Survivors. I represent over 220 Plaintiffs in Prescott v. United States, No. CV LV-80-143 RDF (D. Nevada), a case originally brought against private contractors for death and injuries caused by them to their employees by exposure to radiation at the Nevada Test Site. In this case, the U.S. Government has successfully moved to substitute itself for the contractors as the Defendant. The Government has since filed a motion to dismiss the case based on the discretionary function exception to the Federal Tort Claims Act, a defense not available to the contractors. This motion is still pending.

I am here to speak in support of S. 2454 because I believe the present Warner Amendment is unnecessary, unconstitutional, and has severe policy problems resulting in great injustice and hardship. I concur with Professor Fletcher that the Warner Amendment violates the seventh amendment right to a jury trial, the separation of powers, the fifth amendment takings clause, and the prohibition against ex post facto laws. However, I will not address these issues because I feel he has covered them quite ably.

I. THE TENTH AMENDMENT.

The tenth amendment to the United States Constitution expressly reserves those powers to the states

which are not delegated to the United States by the Constitution nor prohibited by it to the states. An ordered workers' compensation scheme lies at the very heart of a state's relationship with its citizens. The remedy for damages for injured employees is the employers' liability law. Compensation laws are enacted to modify the employment relationship between the employees and their employers. New York C.R. Co. v. White, 243 U.S. 888, 37 S.Ct. 247 (1916).

In Prescott v. United States, 731 F.2d 1388 (9th Cir. 1984), the Ninth Circuit Court of Appeals held that the individual plaintiffs' right to sue the contractor, their former employers, arises out of the failure of those contractors to provide workers compensation coverage. At the trial court level, the court found that the premiums paid by the contractors at the Nevada Test Site did not purchase insurance for workers' compensation coverage for employees for contractors for radiation-caused diseases as a result of exposure to nuclear materials. Prescott v. United States, 523 F.Supp. 918 (D. Nev. 1981), aff'd., Prescott v. United States, 731 F.2d 1388 (9th Cir. 1984). Since the contractors were not being charged for insurance covering radiation-induced occupational diseases contracted by its employees, its coverage was only for non-radiation diseases. As to radiation-induced occupational diseases, the contractors were uninsured direct employers of plaintiffs. Thus, the court held the contractors were not entitled to immunity from suit. In an attempt to avoid paying premiums required under Nevada's workers' compensation laws, the Atomic Energy Commission (who paid the contractors' workers' compensation insurance costs), entered into an agreement with the Nevada Industrial Commission concerning payments by the AEC for radiation diseases contracted at the Nevada Test Site. Both the trial court and the Ninth Circuit Court of Appeals held the contract void and determined that Plaintiffs were authorized to sue the contractors in tort under Nevada law. Nevada law provides that any employer who has failed to provide mandatory coverage required under

Nevada's workers' compensation laws may not assert the defenses of assumption of risks, contributory negligence, or lack of causation. Nev. Rev. Stats. §§616.375, 616.377, 617.275. In addition, negligence is presumed. Id. This right under state law is eliminated by the Warner Amendment, effective October 19, 1984, (only 175 days after the Ninth Circuit Court of Appeals affirmed these rights) which effects not just an abrogation of the workers' rights to sue their employers in state court before a jury, but also defeats the scheme established by Nevada state law to protect and compensate its workers.

Under the tenth amendment the states have exclusive jurisdiction to adjust the rights and obligations between employers and employees when the statutory scheme provided for by law is breached. Also under the tenth amendment Congress should not remove from the states the power to control their workers' compensation schemes.

II. DUE PROCESS

The due process clause of the fifth amendment of the United States Constitution provides that no person shall be deprived of life, liberty, or property, without due process of law. The Warner Amendment abolishes a plaintiff's vested right in his cause of action against a contractor and violates due process in its retroactive application of "unexpected" law.

A. A Plaintiff's Vested Right In His Cause Of Action Against A Contractor.

Because the Warner Amendment provides that it "shall apply to any action now pending . . . ." it deprives a plaintiff of his vested right of action against the contractor which wrongfully caused his injury. A cause of action, once vested by the satisfaction of conditions precedent to suing, is a property right protected by the fifth amendment. Jacklitch v. Redstone Federal Credit Union, 463 F.Supp. 1134, 1139 (N.D. Ala. 1979). Thus, no action by the United States can deprive the owner of a cause of action without just compensation. Id. In addition, the measure of damages is a substantive right. Frank Briscoe

Co., Inc. v. Rutgers, The State University and College of Medicine and Dentistry of New Jersey, 130 N.J.Super. 493, 327 A.2d 687, 690 (1974). The Constitution forbids the extinguishment of property rights. In re Aircrash in Bali, Indonesia on April 22, 1974, 684 F.2d 1301, 1312 (9th Cir. 1982). Once a right has been identified as fundamental, as has the right of access to the courts, the law regulating it is subject to strict scrutiny to determine if the regulation is justified by a sufficient governmental interest. Zablocki v. Redhail, 434 U.S. 374, 386, 98 S.Ct. 673, 681 (1978); Martin v. Lauer, 686 F.2d 24, 32 (D.C. Cir. 1982).

There has been quite a bit of focus on the effect of this amendment on veterans. Senator Warner originally introduced his amendment after being told that the Government had an adequate process to compensate veterans. This is not the case. Even if it were the case, there would still be no process to compensate civilians who have suffered death or injury as a result of exposure to radiation during their employment at the Nevada Test Site, for example. Records show that more than 3,000 veterans have filed disability claims relating to atomic tests, but the Veterans Administration has denied all but 17. When only about 1% of claims are being compensated at all, it is obvious that the Warner Amendment could not meet a strict scrutiny review under the fifth amendment of the United States Constitution.

In fact, in a similar case, Brady v. Roosevelt Steamship Co., 317 U.S. 575, 63 S.Ct. 425 (1943), rehearing denied, 318 U.S. 799, 63 S.Ct. 659 (1943), the United States Supreme Court held that substitution of the United States as the defendant in place of a government contractor, it was detrimental to the interests of private claimants because it would subtract from the legal remedies which the law has afforded them. The right to enforce a vested cause of action comes squarely within the protection of the due process clause. A plaintiff's cause of action, a property right, accrues at the time of his injury. It vests at that

time. Plaintiffs have a vested right to sue a private corporation on a strict liability theory. The strict liability theory is not available in suits against the United States Government. The vested right to sue the private corporation and the remedy that goes with this right cannot be abolished by subsequent legislation such as the Warner Amendment. Therefore, it violates the due process clause of the fifth amendment.

B. Application Of Unexpected Law.

When parties rational expectations are based upon a certain set of laws, it violates due process to breach those expectations by applying unexpected law. McCluney v. Jos. Schlitz Brewing Co., 649 F.2d 578, 580 (8th Cir. 1981), aff'd, 454 U.S. 1071, 102 S.Ct. 624 (1981), rehearing denied, 455 U.S. 929, 102 S.Ct. 1295 (1982). For example, in the Prescott case, when plaintiffs filed their suits against the government contractors, their former employers, they expected to be able to pursue their claims against the contractors under Nevada state law, including imposition of strict liability with a trial by a jury of their peers, an opportunity to recover punitive damages, and a trial in state court. This was a rational expectation. Plaintiffs certainly did not expect to have to pursue their claims under the Federal Tort Claims Act with all its attendant defenses, statute of limitations, claims procedures, trial to a judge rather than to a jury, a negligence theory only, and the unavailability of punitive damages. This is where the breach of due process comes in by application of unexpected law.

III. THE RIGHT OF ACCESS TO THE COURTS.

The right of access to the courts is basic to our system of government, and it is well established that it is one of the fundamental rights protected by the Constitution. Ryland v. Shapiro, 708 F.2d 967, 971 (5th Cir. 1983). The first basis for this right of access is article IV of the Constitution and the fourteenth amendment which accords citizens equal privileges and immunities. Id. This

privilege must be allowed to all citizens to the same extent. Id.

The first amendment is the second constitutional basis to this right of access because it is encompassed by the first amendment right to petition for redress of grievances. California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 92 S.Ct. 609, 612 (1972).

A third constitutional basis for the right of access to the courts is found in the due process clause which requires an opportunity for a hearing at a meaningful time and in a meaningful manner. Boddie v. Connecticut, 401 U.S. 371, 378, 91 S.Ct. 780, 786 (1971).

There is a reliable alternative which achieves the purpose of the United States Government absorbing all liability for tortious conduct of a contractor without violating individuals' constitutional rights. All contractors in the Atomic Weapons Testing Program have comprehensive contracts of indemnification with the United States Government. There is no reason to deprive individuals of their various constitutional rights merely to prevent "embarrassment" or "inconvenience" to the contractors.

IV. EQUAL PROTECTION.

The varying treatment of persons injured by contractors in the Atomic Weapons Testing Program under this statute violates equal protection. The federal government is mandated by the due process clause of the fifth amendment to provide equal protection of the laws. Vance v. Bradley, 440 U.S. 93, 94, 99 S.Ct. 939, 941 (1979). The Warner Amendment discriminates against persons injured by contractors in the performance of the atomic weapons testing programs and it does so patently. This is a mandate for holding that the statute violates the equal protection guarantees embodied in the fifth amendment. There are three tests for determining whether a discriminatory statute is constitutional:

1. The strict scrutiny test, which is appropriate when a fundamental right is present.

2. The intermediate "means-scrutiny" test, which applies to intermediate classifications such as those based upon gender and illegitimacy.

3. The "rational basis" test.

The right of access to the courts is a fundamental right and for this reason the strict scrutiny test should be applied, meaning that the statute may be upheld only if there is a "compelling state interest" to be served and the regulation is "necessary" to achieve the legislative objective. San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 93 S.Ct. 1278 (1973). The statutory treatment of persons injured by contractors in the Atomic Weapons Testing Program is wholly unrelated to achieving any permissible legislative objective and there is no compelling governmental interest to be served by depriving individuals of their constitutional rights.

If the courts determine the intermediate test is to be applied, the Government's interests must be "important" and the means adopted to serve that interest must be "reasonable, not arbitrary" and must "have a fair and substantial relation to the object of the legislation." Reed v. Reed, 404 U.S. 71, 91 S.Ct. 251 (1971). This statute, which insulates contractors in atomic weapons testing programs from all liability and effectively denies individuals any realistic chance for recovery for injuries caused by the program, creates a class of individuals denied equal protection. Our system demands full access to the courts for redress of injuries. This right should not be redefined with each and every legislative whim and each and every special legislatively-granted immunity sought by each and every organized group with the political clout to obtain its goals.

Even if the "rational basis" test were to be applied, which requires only that the legislation bear a rational relationship to a governmental objective, McGowan v. Maryland, 366 U.S. 420, 81 S.Ct. 1101 (1961). The Warner Amendment creates classes based upon the identity and power

of the entity causing injury to a certain group of people. These people have no control over the characteristics which form the basis for the classifications contained in the Warner Amendment. Therefore, it cannot even meet the mere rational basis test and violates equal protection.

V. THE WAR POWER.

The Government has argued that the Warner Amendment is necessary for national defense or for military power. This is the same reason given for Japanese internment in cases such as Korematsu v. United States, 323 U.S. 214, 65 S.Ct. 193 (1944), rehearing denied, 324 U.S. 885, 65 S.Ct. 674 (1945). It is essential that there be definite limits to military discretion. Id., 322 U.S. at 234, 65 S.Ct. at 202. Individuals must not be deprived of their constitutional rights on a plea of military necessity. Id.

VI. COMMERCE POWER.

While the use of nuclear material may be a proper area for congressional legislation pursuant to the commerce clause, the immunization of federal contractors involved in the Atomic Weapons Testing Program from suits for radiation-induced injuries by the Warner Amendment is not. The central concern of the commerce clause is the promotion of a national economy and free trade among the states. However, in the Warner Amendment there is federal over-reaching which usurps constitutional rights guaranteed to individuals.

VII. POLICY CONSIDERATIONS

A. Generally.

There is a disparity in the respective ability of the parties involved to present and protect their interests. On the one hand there is a contractor wholly indemnified by the United States Government, and on the other hand, a class of injured workers whose constitutional rights may be advanced by litigation against the contractor. The resources of opposing parties are disproportionate. Ranged against plaintiffs have been the legal staff of the United States Attorneys' Office and the United States Department of Justice and attorneys for the government contractors. Few

litigants--even the wealthiest--come into court with resources at once so formidable and so suited to the litigation task at hand. Moreover, this sort of case is an enterprise on which any private individual should shudder to embark. To secure counsel willing to undertake the job of trial necessarily means that someone--the plaintiff or his attorney--must make a great sacrifice unless equity intervenes. To meet the discretionary function and misrepresentation exceptions to the FTCA, which are available to the Government but not the contractors, individual Plaintiffs must face the greatly increase costs of discovery and extended trial time. The government attorneys try to get the trial courts to order multiple "mini-trials" in hopes of bankrupting plaintiffs or their attorneys without a trial on the merits.

There is also the concern with the nature of the impact of the change in law upon existing rights. In other words, there is the probability that new, unanticipated obligations will be imposed upon a party. This is certainly the case in pending cases because the Warner Amendment completely abrogated plaintiffs' strict liability causes of action against the contractors and replaced them with the negligence cause of action against the United States Government greatly increasing costs and imposing new and different defenses. It deprived the plaintiffs of a jury trial. In short, it causes "manifest injustice."

B. Specific Examples.

Examples of operations which demonstrate contractor negligence which form the basis for litigation are documented as attachments 1 through 5. These examples are taken from the first tunnel shots after underground testing resumed in the fall of 1961.

Attachment 1 is a November 1961 memorandum to the Atomic Energy Commission regarding radiation exposure at NTS tunnels "B" and "E". Antler Shot was the first test after the moratorium, detonated September 15, 1961 in "E" tunnel. It contaminated the tunnel and vented a large amount of

radiation into the atmosphere. The efforts to salvage the U12e (U stands for underground, 12 for Area 12, and e for "E" tunnel) tunnel resulted in exposing 22 underground workers to internal whole-body exposures exceeding the quarterly limit of 3 rem. Although it was alleged none received greater than 5 rem during the U12e cleanup, these were external gamma measurements only, with no consideration given for internal dose.

On October 10, 1961, the U12b tunnel complex was contaminated from the venting of the "Chena" test. According to the memorandum, "B" tunnel was still contaminated with tritium and other gross fission residues from the "Evans" test. As recovery teams from "E" tunnel after the "Antler" shot were "burned out" (exceeded the allowable 3 rem/quarter), they were transferred to "B" tunnel even after the Chena firing where they faced both external and internal tritium exposure.

The result: 108 tunnel workers were exposed to greater than the allowable 3 rem/quarter combined (external plus internal) whole-body exposure. Of those workers, 38 exceeded the allowable 5 rem/quarter over a year limit. The highest exposure was apparently 8.045 rem.

Attachments 2 and 2B document the sacrifice of safety in succeeding recovery operations, specifically involving Keith Prescott. He worked in contaminated tunnels "E" and "B" during the fall of 1961 and he was repeatedly exposed to radiation in 1962. The attachment documents the events of June 1963 during recovery operations after Shot Yuba. All three recovery crews after Yuba (day, swing, and graveyard shifts) were exposed to radiation. With full knowledge of the potential dangers of the contamination, Keith Prescott's crew was ordered back into the tunnel. One worker received a thyroid dosage of 60 rad (radiation absorption dose). At that time, the Federal Radiation Council recommended standard was 30 rad/year.

Attachment 3 is a newspaper article describing one of the earliest incidents of over-exposure of workers at the

Nevada Test Site. This occurred in 1956. There had been no attempt to determine whether those workers were entering a contaminated ground zero. They were contractor employees (except one) with no radiation safety training. The exposures (which are still highly contested) are acknowledged by the records to have been no less than 27 rem, 18 rem, 13 rem, and 4.3 rem. Recognizing that the contractors were responsible for radiation safety monitoring at the Nevada Test Site for all personnel from 1956 onward, and that most NTS employees were contractor employees, the contractors' burden regarding radiation safety is obvious.

Attachment 4 is a September 20, 1957 report on possible alpha contamination incidents occurring in 1957 at Saturn tunnel and at the U3d Pascal B well. This evidences poor performance by the contractors' monitors. The monitors entered contaminated tunnels without protective clothing or respirators; an iron worker contaminated his truck, tools, and air hose; no instructions on working in alpha contaminated areas were given to contractor employees.

Attachment 5 discusses the over-exposure of Eugene Haynes, who recently died of cancer. On March 1, 1955, Mr. Haynes, a security guard proceeded to a shot area to provide surveillance over plutonium spheres until they could be recovered. He was provided with protective clothing, respirator, dosimeter, and film badge, but received no radiation safety briefing. He was instructed to go with the initial rad-safe survey team where he could maintain visual surveillance over the plutonium until it could be recovered. The rad-safe survey team left before he did and Mr. Haynes could not find them. Therefore, he proceeded to within one-quarter mile of ground zero where he was then directed by security headquarters to return immediately to rad-safe. He was in the contaminated area a maximum of 20 minutes and the dosimeter reading was off-scale and the film badge indicated a total exposure of 39 r. Inadequate rad-safe procedures to prevent entry of personnel into contaminated areas without proper rad-supervision led to this over-exposure.

These examples are meant to introduce the members of this Committee to the practices of the private contractors in the conduct of the atomic weapons testing program. This is meant to demonstrate why the contractors should not be absolved of primary responsibility for the exposures of civilian test site personnel.

C. S. 2454 and H.R. 1338

I next wish to discuss why S. 2454 is preferable to H.R. 1338. S. 2454 is a simple repeal of the Warner Amendment which would be effective October 19, 1984. However, H.R. 1338 is complicated and may not solve the constitutional problems raised by the Warner Amendment. First, it is a complex bill meant to amend the Federal Tort Claims Act, but mandates that the United States shall not be liable for pre-judgment interest or for punitive damages. It also requires that the suit be brought in the United States District Court. If the contractors are not defendants, discovery is greatly complicated. In addition, H.R. 1338 provides that the United States shall have available only those defenses available to the contractor. However, it still makes no mention of the availability of theories of liability against the Government which are available against the contractors, such as strict liability for ultrahazardous activity.

CONCLUSION

For these reasons, I respectfully request that this Committee recommend repeal the Warner Amendment by passage of S. 2454. I thank you for this opportunity to speak on behalf of American citizens injured in the course of their service to the United States Government and its contractors.

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Speaking on behalf of Nevada
Test Site Employees and the
National Association of
Radiation Survivors.

[redacted]

UNITED STATES
ATOMIC ENERGY COMMISSION
WASHINGTON 25, D. C.

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MEMORANDUM FOR CHAIRMAN SEABORG
COMMISSIONER GRAHAM
COMMISSIONER HAWORTH
COMMISSIONER OLSON
COMMISSIONER WILSON

THROUGH: GENERAL MANAGER →

SUBJECT: RADIATION EXPOSURE AT NTS TUNNELS "B" AND "E"

The purpose of this memorandum is to advise the Commission of the current LRL tunnel testing situation with specific reference to the difficulties which have resulted from the Antler shot [redacted] fired on September 15 -- the first underground nuclear detonation of the current test series) and the Chena shot [redacted] fired on October 10, 1961), the resultant personnel exposures, and the subsequent withdrawal of personnel on November 27, 1961, from the U12b and U12e tunnel complexes.

The LRL Underground Testing Capability at the Beginning of the Test Series. When the current test series resumed the only de facto capability the LRL had for underground testing existed in two tunnel complexes at NTS known as the U12b tunnel (7 shot sites) and the U12e tunnel (5 shot sites). LASL tests are conducted in deep underground holes. At the beginning of the current test series, 2 holes existed, 3 have now been expended and others are being drilled. Four new LRL tunnel complexes (known as G, I, J and K) are now being prepared.

The Loss of the U12e Tunnel. With regard to the U12e tunnel complex, the firing of the Antler shot resulted in loss of entry into the tunnel complex because of contamination and spread of debris throughout the side drift and the main tunnel. Specifically, the Commissioners will recall that approximately 10 minutes after the Antler shot a secondary explosion, caused by the generation of steam from water in the shot

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NON-CCRP

ATTACHMENT 1

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region, caused radioactive steam to enter the main tunnel with some escape from the portal. This secondary explosion has effectively eliminated to date the U12e tunnel complex as a firing site.

The Decontamination of the U12e Tunnel. Following the Antler shot, a program was commenced to decontaminate and rehabilitate the U12e complex so as to attempt to salvage remaining 4 shot locations which had been previously constructed. The decontamination proved to be very difficult because access to the tunnel walls was prohibited due to spread of debris and obstructions, such as ventilation pipes, cabling, etc.

Although the radiation levels inside the tunnel were high initially, for example, 22 roentgens (r) per hour at the portal, the tunnel has now been decontaminated to a point where the radiation at the portal is 15 milli-roentgens (mr) per hour, 100 mr per hour at 1000 feet, 200 mr per hour at 1500 feet, 300 mr per hour at 1700 ft. The U12e tunnel rehabilitation has now been accomplished to a point about 1800 feet from the portal. This recovery was accomplished in about 50 days at a cost of approximately $175,000. At this point, the tunnel is plugged by massive debris from the side drift where the Antler device was placed. It has been determined that rather than attempt to remove the debris plug, it should be by-passed and that work is now proceeding. Until we are able to complete the by-pass, we do not know whether in fact the remaining shot sites of the U12e tunnel can be used because we do not know the levels of radiation in the tunnel beyond the debris plug or the condition of the tunnel beyond that point. A recent drill hole into the latter portion of the tunnel indicated a level of 700 mr per hour to 1.5 r per hour but this possibly was influenced by radiation from the debris plug.

The Exposure in Tunnel U12e. As a result of the U12e tunnel decontamination effort, 22 underground workers had, as of November 15, 1961, accumulated external body exposures exceeding 3 rem per quarter. No one had accumulated external whole body exposures exceeding 5 rem per year.

The Contamination of the U12b Tunnel Complex. With regard to the U12b tunnel complex, we have had a troublesome problem with regard to tritium in a portion of the tunnel. This problem arose from the Chena event (the Arrow device which was fired on October 10, 1961) and was complicated by the tritium residue remaining from the Evans event of Hardtack II

[redacted]

The Chena and Evans devices were fired within close proximity of each other. [redacted]

[redacted]

The Determination that Tritium was in the U12b Tunnel and Subsequent Added Ventilation. Probably because of the low yield, the Chena device did not stem properly and gaseous fission products and tritium leaked into the main tunnel immediately after the detonation. Radioactive gaseous emissions into the tunnel precluded re-entry until 48 hours after the Chena detonation. Once the re-entry was made, radiation monitoring indicated fissuring between Chena ground zero, Evans ground zero and the main tunnel. Due to a combination of circumstances, gaseous fission products, and apparently tritiated water vapor, continued to seep through the fissures into the main tunnel for some time after the detonation.

Before the Chena event, as exposures of workers engaged in the decontamination procedures in the U12e tunnel approached 3 rem per quarter, they were transferred to the U12b tunnel to perform work in that complex. This procedure continued after the Chena firing. Although analysis of urine samples from two personnel in the re-entry team indicated the presence of a barely detectable level of tritium, concentrations of interfering gaseous fission product radioisotopes were large enough that standard air sampling techniques for tritium were virtually impossible for some time following the firing.

After the Chena event, a periodic urine analysis program showing intake and possible retention of tritium was established for all workmen entering the U12b tunnel complex. Computed radiation exposures from urine essay data exceeded those which had been predicted. Urine analyses continued to indicate higher retention rates than expected even though air sampling techniques were improved. Upon determination that air concentrations of tritium did exceed predicted levels, additional ventilation equipment was installed.

The Combined Exposure Due to Work in the U12b and U12e Tunnels. The combination of the external radiation whole body exposures in the U12e tunnel and the additional internal exposure in the U12b tunnel has resulted in 108 miners and supporting personnel receiving, as of November 24, 1961, a combined whole body exposure in excess of 3 rem in one quarter and of these 36 in excess of 5 rem in one year. No individual was exposed to more than 8.045 rem.

The NTS Radiation Criteria. The criteria for normal peacetime operations allow for exposures up to 12 rem per year (at a rate of 3 rem per quarter) provided such exposure does not exceed the formula (N-18) 5 rem, where N equals the man's age at his next birthday. Also, exposures in excess of 5 rem per year must be justified on the basis of necessity of an operation. With reference to criteria discussed above, it is believed that the exposures are well below amounts which would be considered significant to the health of the individuals.

The Curtailment of Operations in the U12b and U12e Tunnels. Because of our inability to continue full scale tunnel operations within the normal established peacetime criteria, specifically a rate of 3 rem per quarter could not be exceeded regardless of whether the annual exposure was 5 rem or 12 rem, the U12b and U12e tunnel operations were curtailed on November 27, 1961. Underground workers who were approaching the 3 rem per quarter were removed from the tunnels, as well as any individuals who may have received a dosage of 3 rems per quarter.

The most difficult problem has arisen with regard to the U12b tunnel where essentially all key personnel have been exposed to the allowable quarterly limit. As a result, all mining personnel, including locomotive operators, have been pulled out of the tunnel. Essentially all work in that tunnel has been stopped. We at this moment have no indication when work can be resumed under the present radiation criteria. It should be pointed out that previous rotation of tunnel workers to attempt to keep within 3 rem per quarter has already brought about a potentially dangerous situation wherein serious accidents could occur within the tunnel because of rotation of individuals within crews.

Future Action. We are now in the process of assessing the effect of holding to the 3 rem per quarter in the U12b and U12e tunnels. There is no doubt that this will have a serious effect upon the Dougat schedule. In the very near future, we will make a recommendation to the Commission as to whether the radiation criteria should be revised for the current weapons test program or whether additional steps can be taken to continue operations under the current criteria and we are very doubtful of this latter possibility.

C. E. Anderson, Col.

for A. W. Betts
Brigadier General, USA
Director of Military Application

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MONITORING OF SEVERAL INDIVIDUALS EXPOSED TO MIXED FISSION PRODUCT GASES AT NTS

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(*Read by title*)

Abstract—On June 6, 1963, several men working at the Nevada Test Site were accidentally exposed to fission product gases in a tunnel. The men were subsequently monitored using a 3 in. × 3 in. NaI collimated crystal and a multichannel analyzer. A phantom was constructed and the assembly was calibrated with several isotopes, the results being used in an extrapolation to find the efficiencies for ^{133}I and ^{135}I. Over 100 spectra were recorded, tracing the history of ^{131}I, ^{133}I and ^{135}I from 8 hr after exposure to two weeks. Activity to dose conversion factors were developed for the various isotopes of iodine and dose estimates were calculated for the exposed individuals. These same dose conversion factors have been applied to predicted iodine ratios from the fission of ^{235}U and an estimate of activity-dose conversion factor vs. time of gas release has been made.

INTRODUCTION

At approximately 9.00 a.m., June 6, 1963, a representative of Reynolds Electrical and Engineering Company, Inc. (REECo.), prime contractor at the Nevada Test Site called the Southwestern Radiological Health Laboratory (SWRHL) of the U.S. Public Health Service to request the Laboratory's assistance with emergency radiation monitoring of thirteen men accidentally exposed to fission product gases in a tunnel at NTS. The gases were the product of an underground nuclear detonation at 10.00 a.m., June 5, 1963.

The equipment available for assessing exposure consisted of a sealed 3 in. × 3 in. photomultiplier—NaI crystal assembly fitted into a flat field collimator similar to that used in routine medical thyroid studies. The collimator was directed toward a large, shielded enclosure to reduce background. The assembly was connected to a 400-channel analyzer with integrator-resolver, tape output and input, and x–y plotter accessories.

The subjects were counted with the collimator pointed at the thyroid, the abdomen, and the thigh. A "Cutie Pie" dosimeter with beta shield closed was also used to determine dose rate at the skin surface over the thyroid. Cutie Pie results are shown in Fig. 1. Thyroid measurements with the collimator-crystal assembly were first made 12 in. from the thyroid (with the thyroid 17 in. from the crystal face).

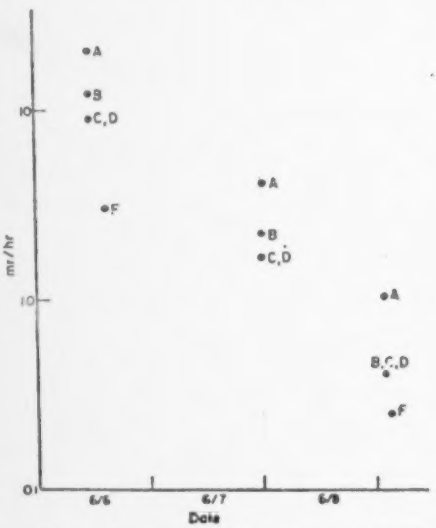


Fig. 1. Dose rate at skin surface over thyroid measured with a "Cutie Pie."

ATTACHMENT 2B

This distance was made necessary by large values for dead time, which in early counts was as high as 90 per cent at normal counting distances. However, after the first week of measurements, the distance could be reduced to 2.5 in. No appreciable changes in dose rates were observed after showering and clothing changes. Because of his availability, Subject F was counted several times the first day and then once each day for an entire week. He was counted again two weeks after the exposure.

Calibration

Two phantoms were used to calibrate the assembly. A rice-filled phantom provided by Dr. HOWARD ANDREWS of the National Institutes of Health was used to calibrate for ^{131}I. A paraffin neck-phantom was used in calibrating for ^{132}I and ^{135}I. Since standard solutions of ^{133}I and ^{135}I were not available, calibration factors for several different isotopes were interpolated to obtain the efficiency for counting ^{133}I and ^{135}I. The peak efficiency for ^{133}I was obtained by interpolation between peak efficiencies for ^{137}Cs and ^{131}I; ^{135}I presented a much more complex problem, and the method finally used depended on the similarity between the 1.4 MeV (37 per cent) and 1.28 MeV (34 per cent) peaks of ^{135}I, and the 1.17 MeV and 1.33 MeV peaks of ^{60}Co. The combined peaks of ^{135}I were assigned a 35.5 per cent abundance when compared to those of ^{60}Co.

Activity-to-dose conversion values

The dose conversion values (see Table 1) used in this report are based on data from ICRP II[1] and a simple one-compartment model with a biological half-time of 5 hr for thyroid uptake. The exchange between lungs and the blood stream was assumed to be instantaneous. The conversion factors are based on iodine actually in a 20 g thyroid extrapolated to the time of injection.

Table 1. Activity-to-dose conversion factors for isotopes of iodine. Activities extrapolated to time of exposure

Isotope	Conversion factor (Rad/μc)
^{131}I	6.85
^{132}I	0.062
^{133}I	1.18
^{134}I	0.0165
^{135}I	0.27

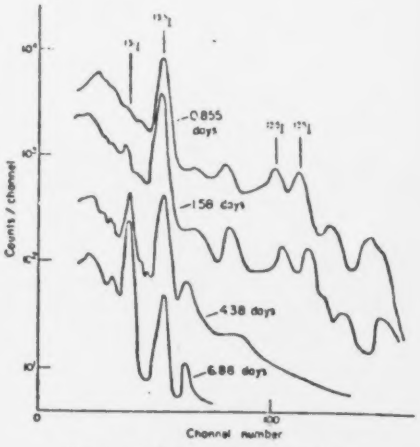


FIG. 2. Typical spectra observed on thyroid of Subject F.

RESULTS

One-hundred and sixty-five spectra were obtained between June 6, 1963 and June 21, 1963. About 20 early spectra were rejected because of poor resolution due to a ground loop in the counting system. About 50 spectra were calibrations and establishment of backgrounds. Figure 2 shows four typical spectra observed from the thyroid of Subject F. A detailed early spectrum from Subject F is shown in Fig. 3. Note that peaks from the tellurium precursors and xenon daughter products were not observed. Evidence of ^{135}Xe can be found in an early thigh spectrum. It is possible that some ^{132}I is present in this spectrum since it could be masked by the other isotopes; however, the quantities of ^{132}I would necessarily have to be quite small. The ^{132}I activity-to-dose conversion factor is small and the contribution of ^{132}I to the total integrated dose would be insignificant. Figure 4 shows the activity in the energy region 0.46–0.60 MeV which represents the peak region of the ^{133}I. Iodine-133 in the thyroid of Subject F showed an effective half life of 0.83 days which is in fairly close agreement with the value of ICRP II[1] (0.87 days).

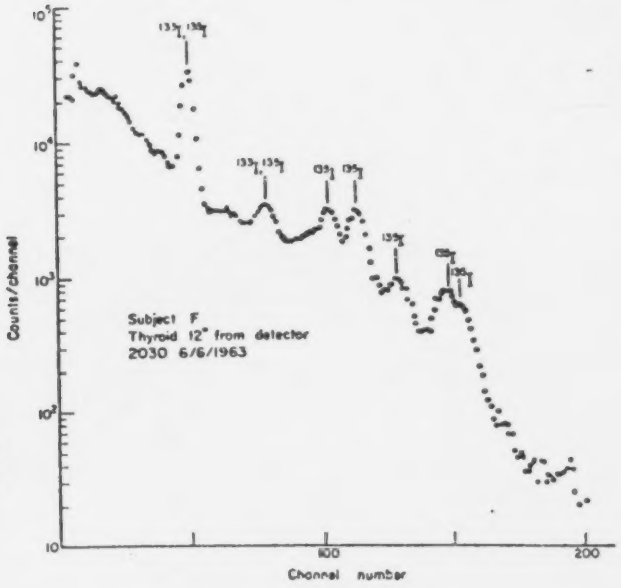


FIG. 3. Detailed early thyroid spectra on Subject F. (Note the absence of either tellurium or xenon peaks.)

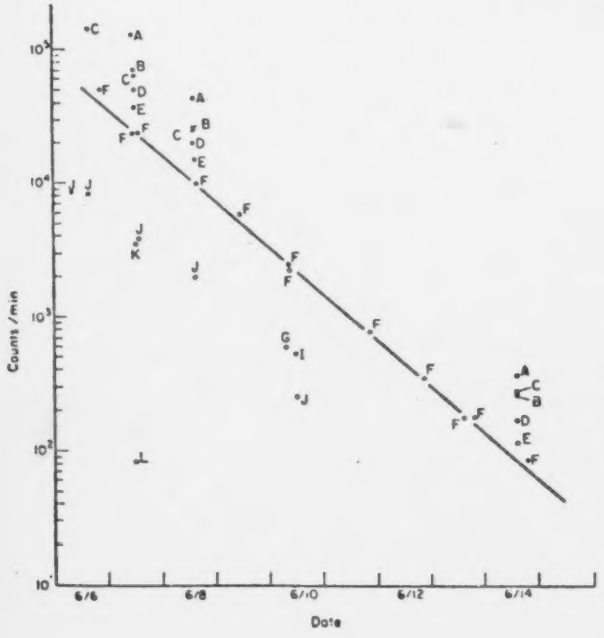


FIG. 4. Activity in the 0.53 MeV photopeak region of ^{133}I (0.46–0.60 MeV).

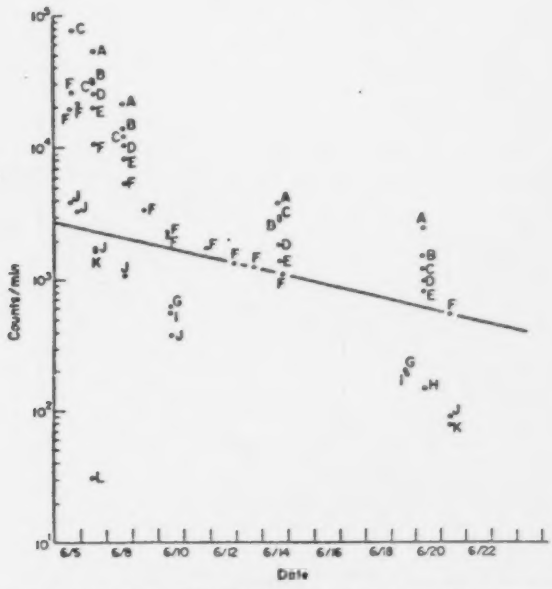
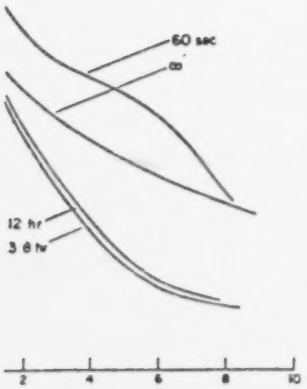


FIG. 5. Acitivity in the 0.364 MeV photopeak region of ^{131}I (0.30–0.40 MeV).

Table 2. Iodine burdens in the thyroid and calculated total doses

Subject	Duration of exposure (hr)	Thyroid burden in μc			Total dose in rads	Remarks
		^{131}I	^{133}I	^{135}I		
A	3	4.45	226	1112	593	No respirator
B	3	2.78	138	690	371	No respirator
C	¾	2.62	131	654	350	No respirator
D	3	1.99	99.5	497	265	No respirator
E	4	1.50	75	375	200	No respirator
F	2½	1	50	250	133	Respirator on for 5 min.
G		0.280	14	70	37	No respirator
H	3	0.270	13.5	67.4	36	Respirator on for 30 min.
I		0.251	12.6	62.7	34	No respirator
J	3	0.161	8.05	40.2	21	Respirator part of time
K	½	0.150	7.50	37.5	20	Respirator entire time
L	1½	0.012	0.600	3	1½	Left area before release



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es based on ^{131}I as 1 were: ^{131}I—1,
nd ^{135}I—250. These estimates are
e activities extrapolated to the time
and are derived from the averages
s shown in Figs. 4 and 5, assuming
jects were exposed to identical gas

estimates for iodine burden in the thyroid and the calculated total dose are found in Table 2. Table 2 also shows the estimated duration of exposures and remarks regarding the use of respirators by some of the subjects.

Predicted dose conversion factor

The activity to dose conversion factors (see Table 1) were applied to the predicted values for a relative abundance of isotopes of iodine from the fission of ^{235}U by BOLLES and BALLOU.[2] Figure 6 shows the dose conversion factor vs. day of exposure for precursor buildup from 60 sec until the actual time of exposure. The exposure is assumed to be instantaneous.

DISCUSSION

Determination of rather low dosages of short-lived isotopes of iodine can be made with very modest equipment and a minimum amount of shielding. Some difficulty is encountered in attempting to calibrate for the short-lived isotopes, particularly ^{135}I. Strontium-85 standards are now readily available and could be used for the ^{133}I calibration. In view of the methods of calibrating used in this study (particularly the use of ^{60}Co in calibrating for ^{135}I), an uncertainty factor of ± 50 per cent is assigned to the results. Dose conversion factors were not available in the literature at the time of the incident and initial estimates which neglected the 5 hr half time for uptake were significantly different from the values appearing in this report for the shorter lived isotopes (^{133}I and ^{135}I). The predicted dose conversion factors graph is included, not because of any utility in predicting dose conversion factors, but to show the extreme range of values that can occur by varying the precursor buildup time.

Acknowledgments—The author wishes to thank DR. HOWARD ANDREWS of the National Institutes of Health and C. B. KINCAID of the Rockville Radiological Health Laboratory for their assistance in obtaining standards, and P. N. LEM, Southwestern Radiological Health Laboratory, for his assistance in obtaining and analyzing the data. JOSEPH PROTHRO, Southwestern Radiological Health Laboratory, computed the predicted dose conversion factors.

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1. *Report of ICRP Committee II on Permissible Dose of Internal Radiation* (1959), *Health Phys.* **3**, 1 (1960).
2. R. C. BOLLES and N. E. BALLOU, National Radiological Defense Laboratory, USNRDL-456 (1956).

SEP 20 1957

Brig. General Alfred D. Starbird, USA
Director of Military Application

James E. Reeves, Test Manager
Nevada Test Organization

REPORT ON POSSIBLE ALPHA CONTAMINATION INCIDENTS

Symbols: T:RHC

The following report outlines the events that occurred on August 30 in Areas U3d and the Saturn tunnel Area 12 which resulted in possible plutonium inhalation. Each incident will be discussed separately.

1. Incident No. 1 - Saturn tunnel Area 12

On the afternoon of August 30, four UCRL employees entered the Saturn tunnel to make a detailed radiation survey in the room between the two blast doors. Saturn was detonated August 9. The men were: Mr. R. Scott Eybee, party leader and party monitor; William Silver; Kin Wong and D. T. Schueler.

Eybee and Schueler entered the tunnel to the first blast door and monitored that area. Radiation readings were between 200 to 400 c/m alpha which was the instrument background. They then returned to their truck and while Eybee, Silver and Wong were putting on protective clothing, Schueler connected an electrical cable to a panel at the portal of the tunnel. He immediately observed a puff of smoke coming from the first blast door, which is some 200 feet inside the tunnel. An exhaust blower was operating at the time, with the intake about 10 feet from the first blast door and exhausting into the outer atmosphere.

Eybee and Schueler, in protective clothing but without respiratory protection, re-entered the tunnel up to the first blast door. They detected a very slight odor of smoke as most of it had been cleared out by the exhaust blower. Eybee monitored the blast door for alpha contamination and found a maximum of 10,000 c/m and withdrew from the immediate area. Silver and Wong then entered the tunnel. Silver put on a respirator and continued the survey.

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ATTACHMENT 4

Scheeler then left the tunnel and returned with three respirators for Rybee, Wong and himself. Respirators were worn when in the tunnel area. The exhaust blower was turned off and Rybee and Wong removed respirators and put on Scott air packs to open the first blast door. They found the room filled with smoke more previously it had been cleared. Wong entered the room and sampled the atmosphere for CO. The concentration was 400 ppm or about four times the maximum permissible level for continuous exposure. Wong left the room and Rybee entered with a light and an alpha survey instrument.

Rybee found an electrical cable spool that read 100,000 c/m and a detonator box reading 100,000 counts. Rybee and Wong left the room and closed the blast door. The total time in the room was about five minutes.

The party monitored themselves for contamination before leaving the area. The shoe covers of Rybee and Wong were found contaminated to 2,000 c/m. No other personal contamination was found. Nose swipes were taken on the participants. The following results showed d/m for the two nostrils:

	August 30	August 31	September 3
Rybee	602/193	220/114	90/83
Scheeler	640/87	515/62	234/32
Wong	182/168	114/33	51/22
Silver	53/21	10/20	23/0

The number of 4,000 c/m for Rybee as transmitted in my teletype of August 31, 1957, has been found in error, probably a result of sending information before it could be confirmed or evaluated. The decay over the four-day period is believed due to radon and daughter products.

The outside of the filters from the respirators that were worn were counted and found to have 5,000 c/m. After three-day decay the count had not changed. The inside read about 200 c/m. The filter paper on the air sampler located at the first blast door was reading 100,000 c/m after a three-day decay. Urine samples have been submitted on all four men to UCRL for plutonium analysis.

The review of these events make it clear that this explosion could properly have occurred at any time the electrical cable was

(continued)

plugged into the panel. From talking to the people involved, we do not feel that there was a significant plutonium inhalation. The results of the urine samples will not be received for some time and we will then advise concerning them.

2. Incident No. 2 - Area U3d

On Friday, August 30, an attempt was made by Program 11 to pull the cable from the Pascal B well in Area U3d to obtain a sample of weapons debris for chemical analysis. Program 11 is sponsored by LASL. Paul Hegler, LASL Engineer in charge of Area 3, arranged to have REECO personnel for this work, but REECO Rad-Safety was not alerted that there might be possible alpha contamination.

It was first thought that an adequate sample could be obtained by removing the contamination from the upper portion of the cable. After measuring and wiping the first 150 feet of the cable, it was decided that the levels were too low for an adequate sample. Decontamination of the cable would have been continued except that it was thought to be dangerous to remain in the building because of falling lumber which had been loosened during the Franklin Prime detonation. During this procedure, all personnel wore rad-safety protective clothing. All had respirators which were worn when in the work area. REECO Rad-Safety was not involved except that they manned a check point on the road entering the area, and persons without protective clothing or access passes were not allowed to enter the area as is the standard procedure.

At noon all personnel who stopped to eat lunch were checked by REECO. The elevator operator was the only one found to be contaminated. This was from grease spots on his clothing. He was given clean clothing. Those persons that returned to CP-2 (Rad-Safety Building) were again monitored by REECO and found to be free of contamination. Only small amounts of contamination had been encountered up to this point, and the entire Area U3d was relatively clean.

Bruce Reibe and Jack Aeby returned to the site after lunch with Rene Prestwood for whom the sample was being collected.

(continued)

None were wearing protective clothing as the purpose was to look over the situation. However, work had continued during the noon hour, and they found the plug was within 150 feet of the surface, and the end of the canister cable shortly came into view. After the REECO monitor from the check point took readings on the cable, Prestwood decided to cut off the last six feet from which the sample could be obtained. A REECO Iron Worker, Edward Tremelling, performed the cutting, using a torch. He wore protective clothing and a Comfo respirator. The cut cable was to be placed into a plastic bag but instead was thrown on to the ground outside where it was cut into two pieces for ease of handling. The welder went back and forth to his truck, and by these actions contamination was spread to the truck, tools, and air hose. REECO Rad-Safety set up a "hot area" to keep people away, as there were many people watching and milling around.

At the end of this operation, Mr. Tremelling was monitored, and his hands were found to be contaminated to about 3,000 c/m. He had taken his respirator off, and, before he could be advised otherwise, he was seen to wipe his nose with one hand. The nose count on one nostril was 45,000 c/m and about 2,000 c/m on the other. Since his high nose swipe reading was very likely caused from contamination when he passed his contaminated hand across his nose, his internal dose should not be judged to be serious solely from the nose swipe test.

All persons were monitored and all vehicles and equipment checked before leaving the area. Some tools and quipment were kept for decontamination. All protective clothing were removed in the field after the persons left the contaminated area. Personnel were advised to go through CP-2 for shower, but the record does not show that they followed this advice.

The following people were involved in this incident. Actually the Sandia Corporation men were present to accomplish unrelated work in the contaminated area:

(continued)

Edward Trenelling, REECO - Iron Worker (Welder)
L. D. Gunter, REECO - Electrician
Phil Lawson, REECO - Electrician
C. R. Eckles, REECO - Electrician
L. Raynie, REECO - Truck Driver
Paul Hegler, LASL - Engineer in charge of area
D. A. McKown, LASL - Recovery Team
Bruce Riebe, LASL - Recovery Team
J. Richards, LASL - Recovery Team
R. Prestwood, LASL - Radiochemist for whom sample collected
Jack Aeby, LASL - LASL Rad-Safety Liaison Officer
R. G. Scharrer, Sandia Corporation
C. O. Curry, Sandia Corporation

Urine samples have been collected from all of the above personnel and REECO Rad-Safety personnel involved, and results will be forwarded as soon as received.

It is easy to critize an operation after-the-fact. However, certain points are noted:

1. Since Area U3d was considered a clean area prior to the work (except for the building), the standard recovery party rad-safety procedures were not necessary. Therefore, there was no one named as Party Leader and Party Monitor. However, once contamination was encountered, the work should have stopped and the situation revieved and operating procedures worked out. No one took this authority.

2. After the alpha contamination was encountered, the REECO monitors notified their Division Superintendent at CP-2. However, no rad-safety assistance was requested by LASL, and the REECO rad-safety persons in the area were mutually check station monitors.

3. There were no instructions on working in alpha contaminated areas given to REECO laborers.

Following the incidents, the Test Director requested written reports from the Directors of the Test Groups involved. In that the radiation exposures were associated with poor judgment, it is the Test

(continued)

Director's feeling that if the same persons are again in an incident which indicates poor judgment, then steps will be taken to exclude them from future participation insofar as radiation is concerned.

The Test Director also published the attached Test Bulletin. If the Test Director's Rad-Safety Officer is advised of any contemplated work in even suspected alpha contaminated areas, a recurrence of an incident such as related herein can be avoided.

Enclosure:
TD Bulletin No. 92

CC: Dr. C. L. Dunham, Director
DB4, AEC, Wash., D. C., w/cy encl
W. E. Johnson, REECO, w/o encl
E. Mathews, S&FP Div., ALO, w/cy encl
Ofc of Test Oprs, ALO, w/o encl
W. E. Nolan, TD's Rad-Safety Ofcr, w/o encl

U. S. ATOMIC ENERGY COMMISSION
NEVADA TEST ORGANIZATION

Office of the Test Director
P. O. Box "A"
Mercury, Nevada

CITE: CTDNS-3(113) September 4, 1957

TEST BULLETIN NO. 92

SUBJECT: Operation Involving Alpha Contamination

All work, including recovery operation when it is anticipated that an alpha contamination problem might present itself, will be brought to the attention of the Test Director's Rad-Safe advisor before any such work is undertaken.

/s/ William E. Nolan Jr.
WILLIAM E. NOLAN, JR.
Rad-Safe Officer
Nevada Test Organization

WNoreb

Copy to:
J. E. Reeves, Test Mgr., (19 cys)
G. W. Johnson, TD, (1 cy)
Max E. Smith, LVBO, (2 cys)
W. S. Hutchinson, Jr., Mil. Ass't to TD, (1 cy)
H. T. Parsons, Deputy for Mil Operations, (14 cys)
K. D. Coleman, DCD TCD, (20 cys)
V. E. Cole, LASL TCD, (45 cys)
H. S. Keller, UCRL TCD, (45 cys)
R. L. Corsbie, CLTC TCD, (26 cys)
J. H. Scott, SC TCD, (20 cys)
J. D. Shreve, SC '57 TCD, (1 cy)
H. E. Crier, EG&G, (5 cys)
Wm. E. Nolan/Gordon L. Jacks, Rad-Safe, (1 cy)
R. A. Lusk, S-1, (1 cy)
C. M. Bacigalupi, S-6, (2 cys)
P. R. Wignall, Air Spt. Grp, (4 cys)
O. P. Stobie, S-3, (27 cys)

STANDARD FORM NO. 64 [redacted]

Office Memorandum • UNITED STATES GOVERNMENT

TO : Dr. John C. Bugher, Director, Division of Biology and Medicine, Washington

DATE: APR 6 1955

FROM : Donald J. Leehey, Manager, Santa Fe Operations

SUBJECT: OVEREXPOSURE OF SECURITY GUARD, EUGENE D. HAYNES

SYMBOL: S:CEG

Forwarded herewith for your information is a copy of a memo report from James E. Reeves, Test Manager, covering a recent overexposure incident at Nevada Test Site.

Donald J. Leehey
Manager

Enclosure:
Cy memo fm Reeves dtd 3/29/55

326 US ATOMIC ENERGY COMMISSION
DIVISION OF BIOLOGY & MEDICINE
3367
Test Personnel Exposure

[redacted]

[redacted] 1-1

ATTACHMENT 5

[redacted]

G. H. Dugger, Director, Safety & Fire Protection Division, Santa Fe Operation

March 29, 1955

James E. Reeves, Test Manager

COPY

OVEREXPOSURE OF SECURITY GUARD, EUGENE D. HAYNES

SYMBOL: TM:JFN

Reference is made to your memorandum of March 25, 1955, requesting a report concerning the overexposure of Eugene D. Haynes to radiation.

On the morning of March 1, 1955, Mr. Haynes proceeded to Tesla shot area after H-hour and before R-hour to provide surveillance over plutonium spheres until they could be recovered, after exposure to the shot Tesla by the Project Recovery party. He was briefed on his mission, receiving instructions on the route to take into the area. He was provided with protective clothing, respirator, dosimeter (range 0-5R) and film badge by on-site rad-safe, but received no rad-safe briefing. He was instructed by the AEC security assistant to accompany the initial rad-safe survey team to the 10R/hr line where he could maintain visual surveillance over the plutonium until recovered. The rad-safe survey team departed prior to Mr. Haynes' departure and Haynes could not locate them. Therefore, he proceeded to within 1/4 mile of Ground Zero, where he advised Security headquarters by radio that he could not locate the 10R/hr line nor the rad-safe monitors. Security headquarters advised Haynes to proceed immediately from the area and return to rad-safe where he turned in his protective clothing, dosimeter and film badge. He was in the contaminated area a maximum of twenty minutes. The dosimeter reading was off scale and the film badge, when developed later that day, indicated a total exposure of 39r. Rad-safe advised AEC security on the morning of March 2 by telephone that Haynes had received the 39r exposure.

DOE ARCHIVES

Mr. Haynes was immediately transferred to duty at Mercury, and on March 4 to duty in Las Vegas. On March 4 he was placed under medical surveillance and blood samples have been collected since that date. Results of blood analyses and physical examination indicate no radiation symptoms as of March 23, 1955.

Investigation of the situations leading to the overexposure, indicated inadequate rad-safe procedures between H-hour and R-hour to prevent entry of personnel into contaminated areas during this period without proper rad-safe supervision. The rad-safe plan has been revised to correct this situation.

cc: S. R. Woodruff

[redacted]

Senator McCONNELL. Thank you, Mr. Haralson.
Mr. Faron.

STATEMENT OF ROBERT S. FARON

Mr. FARON. Thank you, Mr. Chairman.

My name is Robert Faron, and I am an attorney in Washington. I generally do general——

Senator McCONNELL. Pull the mike a little closer, please.

Mr. FARON. I am a volunteer for the National Association of Atomic Veterans. My father was an Air Force officer who was a crewmember of an aircraft used in Operation Standstone in 1948. I myself am a former Air Force officer and I was trained in nuclear safety duties.

On behalf of the National Association of Atomic Veterans, I am honored to be able to testify today. NAAV favors passage of both S. 2454 and H.R. 1338, even though it recognizes that this is a very complex area of constitutional law and a theory of tort reform that is going on in the Congress today. But it believes that there is a requirement for fair and open access to the courts for men who are asked to expose themselves to atomic radiation testing during the course of the atomic weapons program.

The United States must accept responsibility, as any commander would for the well-being of his troops and the responsibility of taking care of those troops for the servicemen who are asked to be experimental witnesses in this atomic testing program.

What I believe NAAV really liked about H.R. 1338 is that it places the United States in a position of parens patriae, for the discretional and operational decisions made during the atomic weapons testing program, without necessarily looking to pin fault on any individual contractor or individual.

It also supports S. 2454, which allows veterans the right to pursue a remedy against the United States in the name of the contractor based upon available causes of action and defenses.

Both bills are helpful, but the National Association of Atomic Veterans believes that what is required at this point is to address the urgent needs of atomic veterans for medical treatment from the effects that they have suffered due to the injuries during their exposure during this test period.

The atomic veterans, I believe, feel particularly betrayed because their needs are being ignored while this Congress and past Congresses have sought and provided relief for other similarly exposed during the atomic weapons testing program, and these people have been compensated while the soldiers of the United States and other personnel connected with the military have been left abandoned.

I believe it is necessary that a nation consider that, while loyalty of an individual to a nation is important in order for a government to maintain legitimacy, it must provide a loyalty back to the citizens who have served it well, especially the men who responded to the orders of their officers and exposed themselves without any knowledge, but with a great sense of trust.

One of the problems that faces atomic veterans is a problem of knowledge based upon the existing state of scientific knowledge. It is very difficult for an atomic veteran to overcome the standards

that are presently applied by the Department of Defense and the Veterans' Administration in asserting claims through the VA process.

One of the pieces of legislation which we urge that you can give consideration to is found in Senator Simon's bill, S. 707. That bill provides a presumption of service-related injury for those atomic veterans who were exposed during the critical periods of the atomic weapons testing program.

Legislation or modifications to Senator Simon's legislation proposed by NAAV would provide for annual medical examinations at VA hospitals of veterans within the critical categories. It would be a presumption of service connection provided at normal variations in conditions which are noted during those examinations and which differ from sound conditions or past medical history of the veteran. And unless the VA, by a panel of expert doctors, can rule out a connection to radiation exposure, this presumption of service connection would apply. I believe this approach would gain support in this Congress from Senator DeConcini, who testified earlier, because it addresses the really urgent needs of many of these atomic veterans who are in financially difficult situations, who are physically deteriorated, but most of all experience a great sense of betrayal that they went out and served their country and their country is standing by and letting them die unattended.

I believe the passage of such legislation will also be in line with preservation of the basic rationale of the Feres doctrine if that is important, if that decision is ultimately determined to be important by this Congress, because it will respond to the rationale that service-connected individuals are provided relief under the Veterans Benefits Act, but at this point in time veterans are not given that right because of the policies of the Veterans' Administration.

In closing, I would like to speak for just a minute. My father was an athletic, vigorous man who in the last 6 years has shrunk almost one-third of his bodyweight. He is unable to walk around the block because he cannot keep enough oxygen in his bloodstream. His red blood cells have disappeared in a sense from his blood. His spleen was recently removed, it was 12 pounds. I have checked with my own personal physician who said a spleen weighs normally 3 ounces.

My father, up until 6 years ago, was in perfect health, so it appeared. We cannot quite figure out where this experience came from. We believe that the 3 months that he spent in the Gilbert and Marshall Islands during the testing period, the flights in or near the atomic cloud, his crew responsibilities and cleaning aircraft and other responsibilities during that time have left my father with a legacy of pain in exchange for the devotion to duty which he showed and demonstrated by his service.

I believe that it is up to the elected representatives of this Nation to ensure that no American who serves in an action or serves in the military and returns as an injured veteran, whether it is a catastrophic injury or one that takes some time to manifest itself, can suffer without receiving any attention. I believe to do less would be to denigrate the values upon which this Nation was formed and would render the social fabric for generations to come.

If the United States fails to keep a social contract with men such as my father and other atomic veterans, I believe my children might say, and perhaps yours would also say, "Hell, no, why should I go." A nation reaps what it sows.

Thank you.

[The prepared statement of Mr. Faron follows:]

STATEMENT OF THE
NATIONAL ASSOCIATION OF ATOMIC VETERANS

Mr. Chairman, my name is Robert S. Faron. I am an attorney in private practice in Washington, D.C. and a volunteer for the National Association of Atomic Veterans. I am here because my father is a former U.S. Air Force officer and crew member of an aircraft used in the Operation Sandstone tests in 1948. I am also a former U.S. Air Force officer who was responsible for Nuclear Safety Duties. I understand the purpose of this hearing is to comment on the provisions of S. 2454 and H.R. 1338. S. 2454 would repeal Section 1631 of Public Law 98-525 which precluded suits against government contractors. H.R. 1338 amends the U.S. Code to allow suits against the U.S. for acts or omissions of its contractors in carrying out the atomic weapons testing program and to substitute the U.S. as a party defendant in suits brought against those contractors. It also provides for a jury trial.

I would also like to use this hearing to briefly identify the priority needs of veterans who participated in the atomic weapons testing program or in other experiences with the U.S. atomic weapons program. Our response will be brief and to the point.

The National Association of Atomic Veterans favors the passage of both S. 2454 and H.R. 1338 in the name of fairness and equity. It favors the guarantee of fair and open access to the U.S. courts that these bills provide for men who were asked in the course of their duties to expose themselves to the effects of atomic radiation. Just as a commander must take responsibility for the well being of his men, the U.S. must accept the responsibility for its servicemen who were asked to respond to their duty, in this case as experimental witnesses of the effects of atomic weapons.

H.R. 1338 would substitute the U.S. as the real party in interest for any of its contractors' liability due to their performance during the atomic weapons testing program but would allow the U.S. only those defenses available a contractor. It would also allow for a jury trial to determine issues of fact. This bill places the U.S. squarely in a position of parens patriae, for all discretional and operational decisions made during the atomic weapons testing program, without pinning fault on the contractor or any individual. While you may question individual provisions of this bill, its thrust is positive in that it meets the spirit of the President's tort reform proposal. It allows a court to determine if the actions of the U.S., including those made through its contractors, meet the standards of fault based liability applicable to a private party for liability due to its actions.

S. 2454 would repeal the provision of law which precluded suits against a government contractor carrying out the provisions of an atomic weapons testing program except under such provisions of law providing a remedy against the U.S. government.

This remedy is also fair and equitable in that it would allow Atomic Veterans the right to pursue a remedy against contractors to the U.S. based on available causes of action, and subject to available defenses. Both these bills are helpful but they do not resolve the urgent problems facing Atomic Veterans seek recognition and assistance from the United States government.

The balance of this statement will be devoted to what the veterans see as their priority needs and objectives.

1. Atomic Veterans have been painfully aware that the federal government has been unable, for forty years, to resolve the dispute over what constitutes radiation damage. The United States government, specifically the Department of Defense and the Veterans Administration, have had the records, the medical expertise and the manpower to resolve these issues. Without full access to this date, the Atomic Veteran is handicapped in his or her effort to seek justice that would be available to all other plaintiffs in U.S. courts.

2. Atomic Veterans have consistent problems securing copies of their military service records. Veterans believe that it is beyond the limits of the imagination for this government to spend $1,000,000,000 on a scientific experiment and then lose or misplace official records. They have a strong suspicion of a cover-up of these records by several departments of the federal government. Recent testimony of the representatives of the General Accounting Office, and subsequent questioning of one of GAO's principal investigators by my colleague, attorney Robert Gary, support this suspicion.

3. Atomic Veterans have been aware that at the time of the Manhattan Project it was anticipated by the government that nuclear related injuries would be sustained and, in fact, injuries were sustained and the injured parties were compensated and medically treated. These veterans cannot avoid extrapolating this knowledge to their own nuclear related exposures.

4. Atomic Veterans are aware that a bill has passed this congress which provides compensation for the people of the Marshall Islands who sustained nuclear-related injuries as a result of the testing of atomic bombs, but are incredulous and experience deep feelings of betrayal that their own needs are being ignored by a nation for whom they held back nothing.

5. Atomic Veterans are critically aware that for forty years they have failed to achieve recognition by their government of their contribution to the security and well being of this nation, which has prided itself in providing for the poor and huddled masses of the world, but has forgotten or ignored its men who stood tall at the order of their commanders. Loyalty to a nation is an invaluable emotion to maintain a national fiber, but to maintain legitimacy loyalty must also flow from a government to its people.

The Atomic Veteran claimant is dependent on the U.S. The Atomic Veteran claimant is often in a deteriorated physical and financial condition. Often

his money has been spent fighting his disease. He often cannot adequately represent his own position.

Moreover his dependency is unique due to his status as a former serviceman. Present laws have impaired his legal remedies. The Atomic Veteran has also had to face a unique and unjust standard of injury or damage established under law presently administered by the Department of Defense and the Veterans Administration. Veterans have been required to demonstrate that they have sustained a certain minimum number of rads to reach a plateau of radiation that "qualified" them for the possibility of medical care and treatment. When, or if, they reached this plateau of radiation, they have to then show a causal relationship to their injury. This standard or plateau of radiation is all the more ominous because it is generally understood that our scientists have not yet determined exactly how much radiation it takes to cause the variety of diseases which are identified as possibly caused by radiation. Exposure to low levels of radiation may cause no immediate apparent injury, but may increase the statistical risk of cancer. Resistance to radiation damage varies among individuals. Techniques for proving the relationship of one's cancer to a certain exposure are not available, except through statistical and epidemiological methods. Indeed, this kind of a burden seems to be unique in our history of dealing with veterans. It is an especially ironic burden because the U.S. may itself be the only repository of the information necessary to sustain the Atomic Veteran's claim.

In the interest of fairness, Mr. Chairman, it also needs to be pointed out that the atomic veterans have not always put their best foot forward in that there has been a splintering of atomic veterans' groups, atomic veterans have occasionally become involved with collateral issues and they have suffered from the lack of consistent representation in the nation's capital as a result of inadequate funds.

At this time the National Association of Atomic Veterans sees the following as its priorities:

S. 707, introduced by Senator Paul Simon, comes the closest to realizing the long sought relief and benefits urged by Atomic Veterans. The most important section of Senator Simon's bill is Section 603 which establishes a presumption relating to exposure to ionizing radiation. The Atomic Veterans need this presumption to overcome the "stacked deck" they have encountered heretofore in VA proceedings.

The following proposed legislation represents a modification of S. 707 and represents the priority interest and objectives of the Atomic Veterans:

> "Any veteran who served in the armed forces between July 16, 1945 and December 31, 1962, and while on military orders occupied any part of an environment that was, while he or she was present therein, radiologically

contaminated by a military nuclear weapon or other nuclear device, regardless of the intensity, type or duration of such nuclear contamination, shall automatically qualify for at least a free medical examination twice a year, beginning on the anniversary of his honorable discharge from the armed forces,and such examination shall be performed at the Veterans Administration hospital of his choice by a physician qualified in nuclear medicine.

If these examinations disclose any abnormal variation from a sound condition, or from a known and reported precondition as shown on the atomic veteran's medical history to that date, such pathology, at the veteran's choice, shall automatically qualify as service-connected in the full meaning of that term under then existing VA regulations unless within 120 days of said determinative examination, three competent specialists, at least one of whom shall be acceptable to the subject veteran, unanimously rule out any connection to his or her presence in the radiologically contaminated environment.

The Veterans Administration shall maintain a Register of all veterans subject to this legislation. Veterans qualifying under this act shall have full and unfettered access to their entire military record upon written request. It is the clear intent of congress, in passing this legislation, that any government official who deliberately refuses to provide their military records be subject to criminal prosecution that could result in fines of not less than $10,000 and/or jail sentences of not more than three years. Any veteran qualifying under this legislation shall have available to him or her the same legal rights of hearing and recourse under U.S. Civil and Criminal Codes as any other U.S. citizen."

The passage of the foregoing recommended legislation will provide the veterans with a fair opportunity to come forward to have his or her medical condition properly diagnosed and fully treated where appropriate. It will give access to relief which for so long has been denied. The approach suggested by NAAV is in line with the basic rationale of the Feres doctrine, that there be relief available under the Veterans Benefits Act for compensation of injured soldiers. There is no such relief currently available for the thousands of atomic soldiers. These veterans seek no special treatment or no new appropriations. They are aware of the budgetary restraints now facing the congress. But, they need Congressional action - now!

In closing, Mr. Chairman, I want to relate a personal experience and beg your indulgence in advance. A decade ago my father was a vigorous athletic man - easily used to walking 18 to 36 holes of golf in a weekend. Within 6 years he shed 40 pounds and is now frail and unable to walk his toddling grandson up and down the block. This condition is due to his inability to maintain normally produced red blood cells in his blood system, and thus retain or transfer oxygen in his body. He must have transfusions weekly or biweekly. They have diagnosed my father's symptoms as myeleo prolific anemia.

Recently his spleen was removed. It weighed 12 lbs. We hope Dad will live a few more years to see his young grandsons get out of grade school. We'll always be uncertain what caused this condition, nevertheless we wonder about whether the two flights near or through the atomic cloud, the various crew duties, including cleaning exposed aircraft and three months living on the Gilbert and Marshall Islands during the height of the testing may have not left Dad with a legacy of pain in exchange for his patriotism and devotion to duty. Yes, my Dad volunteered to serve, as did I, but if the U.S. fails to keep its implied social contract with men such as my Dad and the other Atomic Veterans, perhaps my children, and yours, will say hell no, why should I go? As a nation we reap what we sow.

For a variety of reasons, including our national humanity and our own national interests in preserving the principles of our own constitutional democracy, our citizens, acting through their elected representatives, must ensure that no American, who goes forth in military service, and who returns to that nation as an injured veteran, does not receive adequate care. To do less is to denigrate the values upon which this nation was built and to rend the social fabric of this nation for generations to come.

Robert S. Faron

Senator MCCONNELL. Thank you, Mr. Faron.

Professor Fletcher, in the few cases which have applied section 1631, the courts have explicitly or implicitly held that the statute is constitutional. You have indicated that the reasoning of the courts may be flawed, and I wonder if you could briefly explain your conclusion once again.

Mr. FLETCHER. Yes. There have been three courts that have either explicitly or implicitly upheld the Warner amendment. Only two of those courts have directly addressed the issue in written opinions. The first is a district court opinion by Judge Schwarzer in California. The second is a circuit court opinion in the first circuit. The third is a Nevada case in which there has just been a memorandum opinion, and so I cannot get at the reasoning.

Judge Schwarzer's opinion is the longest. He considers at some length constitutional arguments bearing on the Warner amendment. He makes—well, let me preface what I say by saying I greatly respect Judge Schwarzer. He is a well-respected judge in San Francisco. He is hard working, intelligent, and dedicated but, as will appear, I think he made a serious and fundamental mistake.

It is apparent from Judge Schwarzer's opinion that he thinks that the Warner amendment broke no new ground and that there is nothing unusual about it, and in so saying he cites the Swine Flu Act as precedent, but the Swine Flu Act is fundamentally different. The Swine Flu Act was passed prior to the causes of action accruing, and further, in passing the Swine Flu Act Congress explicitly provided that the Government would indeed be the defendant in place of the manufacturers of the vaccine, but that it would be subject to all of the defenses, but only those defenses available to the private contractors. In other words, the Swine Flu Act did precisely what Representative Boucher's bill would do.

By contrast, the Warner amendment puts the Government in place for suits that are already pending, operating retroactively and taking away defenses otherwise available. I think if Judge Schwarzer had focused on this and had fully understood the seriousness of the underlying separation of powers problem, and if it had been available to him, the evidence in the courtroom that shows up in Representative Boucher's hearing on the bill, that this was not only an accidental byproduct, but the specific purpose of the Warner amendment interferes with these pending suits, I think Judge Schwarzer may very well change his mind.

The reasoning of the first circuit is much, much briefer but to the same effect.

Senator MCCONNELL. I have another question for Professor Fletcher and questions for each of the other witnesses, but we are getting late on time here and I do not want to dominate this further, so I am going to submit them to you in writing for the record and turn to Senator Simon.

Senator SIMON. Thank you. First, since we have been talking about the Warner amendment, I think we should add, in fairness to our colleague, that he is a cosponsor of this bill, S. 2454. I think he did not realize the full implications of his amendment and that happens to all of us.

I would also like to enter into the record an article from this morning's New York Times which is relevant to what we are talk-

ing about here. Let me just read one paragraph from it: "Those in Southwestern Utah are already familiar with the consequences of such testing"—talking about nuclear testing. "Thyroid cancer is eight times the national average, bone cancer, twelve times."

I do not know that those citizens can prove, any more than the veterans or your father can prove that that testing is responsible, but the evidence is just so overwhelming that I do not think the Government of the United States can say, "Sorry, we have no responsibility here." I would like to enter the text of that article in the record.

Senator McCONNELL. Without objection, that will be made a part of the record.

[The article referred to follows:]

[From the New York Times, June 27, 1986]

LET'S NOT FORGET RADIATION IN THE UNITED STATES

(By Richard L. Miller)

HOUSTON.—It was a mild morning in late spring, April 26, when technicians with Geiger counters first discovered high levels of radiation, in some places many times normal.

Instruments in one city not far from an international border recorded 16 million bursts of radiation per minute per square foot—about 16 times normal—all due to fallout. Milk samples were tested and found to be high in iodine-131, an isotope suspected of causing thyroid cancer. Other toxic isotopes such as plutonium and cesium-137 were found in soil samples.

Yet another account of the infamous Chernobyl nuclear reactor accident? No. This event took place not in 1986, but in 1953; the irradiated city was not Bialystok, Poland, but Albany, N.Y. The source of the radiation had not come from a graphite nuclear reactor in the Soviet Union but from an atomic weapon detonated atop a 300-foot tower 70 miles northwest of Las Vegas, Nev.

The radiation resulted from one of a series of 11 atomic tests in 1953. All were detonated above ground. All injected into the atmosphere quantities of nuclear debris that would far surpass the Chernobyl release. The clouds fanned out over the continent.

From 1951 to 1971—and perhaps later—nuclear tests peppered the United States with radiation. The Atomic Energy Commission took part in the tests and until 1963 tracked the clouds as they crossed the continent. For the most part, no warnings were issued. Concerned parents were told by the A.E.C. that strontium-90 amounts—"sunshine units"—were "well within safe limits."

Yet, in Utah farm animals died from radiation exposure and human cancer rates near the test site increased tenfold. Plutonium was found in the soil in Salt Lake City, Denver and Houston. Stillbirth rates in New York showed increases in 1954, 1956 and 1959—the years following intensive testing.

Federal officials have taken the stance that absolutely no increased cancer rates, no medical damage of any kind has occurred as a result of nuclear testing. Chernobyl, however, has provided a new, disturbing perspective on the old argument.

In May 1986, monitors in Portland, Oregon recorded a radiation rate from Chernobyl of about 2,000 disintegration per minute per square foot. An official at the Food and Drug Administration was quick to caution that such fallout levels in the United States were considered quite safe, that the F.D.A. suggests removing dairy cows from the fields only after levels approach 27,000 disintegrations per minute per square foot.

Yet, in 1953, huge amounts of radioactive iodine, now considered hazardous, had been deposited on the ground. Cows were allowed to graze on radioactive grass, milk was allowed to be sold and countless children were exposed to high levels of internal radiation. No warning were issued, reports were classified and life went on as usual.

Shortly after the Chernobyl accident, radioactivity levels in Europe generally varied between three and 20 times normal levels. Children in Poland were given iodine to block the radioactive isotope while Swedish parents warned their children not to play in sandboxes that may have been contaminated by radioactive rain. All the while, political leaders in the West complained about the lack of concern shown by the Russians.

On May 13, Bernard Franke, president of the Institute for Energy and Environmental Research, predicted that fallout from the accident would eventually result in 9,000 cancer cases among West Germany's 60 million people in the next 30 years. If his prediction is correct, it holds ominous implications for those exposed to atomic testing in the 1950's and early 1960's in the United States.

Those in southwestern Utah are already familiar with the consequences of such testing: thyroid cancer is eight times the national average, bone cancer, 12 times. The medical problems may not be limited to Utah.

Chernobyl was a tragedy for the Soviet Union and Europe. But it was also a reminder for America. It brought into sharp focus the very real scope and consequences of radiation exposure. Chernobyl is more than an unfortunate nuclear event. It is a mirror into which we can look and see our own imperfect past.

Senator SIMON. Let me, because in my earlier remarks I was talking about veterans, let me just add that I am concerned also about civilians.

If I may ask, madam—I am sorry, I did not get your name.

Ms. LEGARRETA. It is Dorothy Legarreta.

Senator SIMON. How did you get interested in this and what is your circumstance?

Ms. LEGARRETA. When I was a senior at the University of California in 1944, I took a job at the Crocker Radiation Laboratory, which was part of the Manhattan Engineering District. It paid 50 cents an hour and I was working at a job that paid 35 cents an hour. I had to get security clearance to work at this site. My position was to smash radiologically contaminated glassware that had been used to feed plutonium to animals that we had at the lab. Also there was a cyclotron going, the largest one in the world at that point, where plutonium was originally fabricated for the first time in history.

I thought no more about my work there until my son died of a clearly radiogenic leukemia, one of the leukemias that—in the *Allen* case, four of the plaintiffs were to receive compensation for it. I personally had a thyroid adenoma removed and bear the scar of that.

I am very, very concerned about the genetic effects of radiation exposure. We do not see those right away, but we will be seeing more of them, I am afraid, and I work full time for the National Association of Radiation Survivors because I think a great injustice has been done to our people, both veterans and civilians, as attorney Haralson said, and I leave it to Congress, we all leave it to Congress to right that wrong.

Senator SIMON. Thank you.

If I can just add one other thing, Professor Fletcher, you mentioned that you are not a plaintiffs' lawyer. There is nothing wrong with being a plaintiffs' lawyer. The Department was saying——

Senator MCCONNELL. Mr. Haralson is shaking his head yes.

Senator SIMON. At least one person agrees with me here. [Laughter.]

Plaintiffs' lawyers are out there protecting the public and when the Department of Justice says this is a bill for the plaintiffs' lawyers, this is a bill for the public, to protect the public.

Any reaction you had to Mr. Otte's testimony, particularly that of the gentleman from the Department of Justice—I forget his name—Mr. Willard?

Mr. FLETCHER. Senator Simon, yes, I would like to respond particularly to the thrust of the testimony from Mr. Willard. As I pre-

faced my remarks about Judge Schwarzer, I should preface similarly my remarks about Mr. Willard. He was a law clerk at the same time I was and I know him personally and I have respect for him, but I must say I just disagree fundamentally with what he has said.

He couched his testimony in such a way as to make it appear that the advocates of H.R. 1338 or S. 1454 are seeking special treatment, seeking an exception from the Feres doctrine and the Feres doctrine is a fundamental underpinning of the laws that now exist, any threat to the Feres doctrine would then be seen as widepsread and we have a camel's nose under the tent, a foot in the door sort of argument.

But to characterize the Warner amendment and these efforts to repeal the Warner amendment in such a way is fundamentally to misrepresent the state of affairs.

Mr. Willard does not say accurately what is going on when he says this is an attempt to get around the Feres doctrine. Members of the military have always been able to sue private contractors, and it is here that the right to sue private contractors has specifically and narrowly been taken away after the suits have been brought, and I do not think Mr. Willard fully admitted that in his testimony. Rather, this is—and I must say in response to the talk about plaintiffs' lawyers, plaintiffs' lawyers in my view do a wonderful service in this country. I wish to say that I was not a plaintiffs lawyer. My constituency, in a way, is what I view as an integrity of the constitutional process, and I come at it having absolutely no personal connection to these suits or this issue but as a constitutional matter deeply offended that this trick should have been played by the Warner amendment, and perhaps it played a trick on Senator Warner. As he now sees it, I do not think he was aware of what was going on.

Senator SIMON. If I can just add, Professor Fletcher, one of the pieces of correspondence we have is from the University of California opposing this legislation.

Mr. FLETCHER. Yes.

Senator SIMON. And I would like to enter that in the record and have you respond to that letter in the record as part of the record.

Mr. FLETCHER. I do not now have a copy of the letter, but I——

Senator SIMON. We will provide that for you and if you will respond to us, we will insert that in the record.

Mr. FLETCHER. I would be delighted to take that opportunity, Senator.

[The letter referred to follows:]

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June 26, 1986

Hon. Strom Thurmond
Chairman
Committee on the Judiciary
U. S. Senate
SD-224 Dirksen Senate Office Bldg.
Washington, D.C. 20510

Dear Mr. Chairman:

The University of California strongly opposes enactment of S.2454 which would repeal section 1631 of Public Law 98-525. Repeal of 1631 would require that the University of California and other entities such as AT&T stand trial in place of the United States in defense of the Government's nuclear weapons testing program. Such a result is, and always has been, unacceptable to The Regents of the University of California.

The extraordinary nature of the United States nuclear weapons testing program and the significant effect it has had on this country's national defense and security have mandated from its outset a unique relationship between the Government and those entities assisting the Government in carrying out its program. The Atomic Energy Acts of 1946 and 1954 were passed to ensure that the control and supervision of this purely governmental function would always remain in the hands of the United States. There is no question that the University of California has always acted under the authority of express statute and under the direct supervision and control of the United States in carrying out its role in the weapons testing program.

The decision to use civilian contractors in the United States weapons testing program was made at the highest levels of government. As originally drafted, the bill which became the Atomic Energy Act of 1946 required the Government to terminate existing contracts and to conduct its own research, development and test activities. That draft, however, was materially altered to adopt as the national policy the use of management contracts for the operation of Government-owned facilities so as to gain the full advantage of the skill and experience of American industry. This policy was adopted because of Congress' recognition that the Government did not have sufficient scientific resources to support effectively the United States weapons testing program without private participation.

The decision to conduct the first United States weapons program test was made by President Roosevelt. All subsequent Chief Executives authorized and continued to acknowledge the necessity for conducting nuclear tests.

Each stage in the preparation and implementation of a test series was part of a tightly controlled test plan managed by responsible officials of the United States. Thus, the decisions and acts upon which the plaintiffs in these lawsuits predicate liability--the decision to conduct nuclear tests, the location of the test series, the operations of individual tests, the assessment of risks to test participants--were all decisions left to the discretion, supervision and control of federal officials. Moreover, the University's participation in the United States weapons testing program was at the specific request of the Government in furtherance of a national policy deemed critical to the nation's defense by the elected leaders of the Executive and Legislative branches.

Prior to the enactment of section 1631 the University was faced with an ever increasing number of lawsuits arising out of its participation in the United States weapons testing program. These lawsuits were of great concern and the University strenuously argued to the Department of Justice that the United States enter these cases as it was the only proper defendant in these actions. This was viewed as essential in order to establish and reinforce what should have been obvious: what was at issue in these cases was the weapons testing program of the United States of America. We argued to the Department of Justice that the presence of the United States as a defendant would have a profound impact on the dynamics of the litigation. The focus would then shift as it should from the activities of the University and other contractors for the weapons laboratories to the United States, the party responsible for the weapons testing program.

The Department of Justice drafted and supported passage of 1631. This legislation was a recognition by the United States that while the University and other contractors in the nuclear weapons program played important roles, the ultimate responsibility and authority for the program rested with the United States Government. The University viewed 1631 as an important and necessary step by the United States in fulfilling its obligations to the University with regard to its management of the Department of Energy laboratories. The United States must not renege on this commitment by subjecting the University and other contractors to lengthy trials which concern the Government's conduct of its own affairs.

If these cases are allowed to continue, the principal issue that will be litigated will be the propriety and wisdom of the United States' nuclear weapons development and testing decisions since 1946. Decisions which were made at the highest levels of Government will be under attack. The University did not make nor can it defend such decisions. In fact, in view of the issues to be raised, the court system would appear to be the least effective forum to resolve such matters. If individuals have been injured as a result of the Government's weapons testing program, then the Government should devise a workable and fair administrative mechanism to compensate these individuals.

The United Staes must not ignore its responsibility to the University and other contractors in these lawsuits. At this point, if the University of California is again named as a defendant in these actions, a serious public

misperception will be generated. That misperception will be that the testing of nuclear weapons was something other than a strictly federal responsibility. To allow these cases to proceed against the University and other contractors would foster further confusion and misunderstanding about the governmental nature of the program. This is particularly true now that 1631 has been scrutinized and upheld in federal court. The continuation of the relationship of mutual trust and cooperation between the Government and the University--which is essential to a continued relationship--would be jeopardized by repeal of 1631.

The University's concern about these lawsuits is not diminished by the fact that the Government will be liable for any damages that might be awarded as a result of the indemnification provisions of the contract under which the University manages the laboratories. Although the University is not monetarily exposed in these cases, any adverse judgments would be entered against The Regents of the University of California, with all of the serious, negative connotations that would accompany such judgments. There are also reputational interests of the Los Alamos and Livermore Laboratories and their personnel which are at stake. It must be emphatically stated that if the Government now allows the University to be again placed in the untenable position of defendant in these lawsuits, an important bond between the Government and the University will have been broken.

In conclusion, it is the University's position, and supported by the Department of Energy and the Department of Justice, that for the purposes of civil litigation arising from nuclear weapons testing, the University of California and the National Laboratories it operates must not be placed on trial because they assisted the United States in the defense program of the Nation.

Sincerely,

Paul Sweet
Director, Federal Governmental Relations

cc: U.S. Senator Alan Cranston
U.S. Senator Pete Wilson
U.S. Senator Joseph Biden
U.S. Senator Pete Domenici
U.S. Senator Jeff Bingaman
Members, Committee on the Judiciary
President David P. Gardner
Sr. Vice President William Frazer
Vice President William B. Baker

Senator SIMON. Unless there are other comments, I have nothing further.

Mr. EGAN. Senator Simon, just to respond further to your question about Mr. Willard's characterization of this entire issue, he indicated that it was his understanding that the route that was followed by veterans into court prior to the Warner amendment, I believe he characterized that as subterfuge. I think that is certainly a mischaracterization because it was an existing area or an existing avenue of recourse in fact. To call it subterfuge is I think inappropriate.

Mr. Willard has further asked this committee to agree with him by passing the buck over to the Veterans' Administration. That not only clouds the issue but proceeds from a misunderstanding of what the issue really is. The issue here, as I indicated in my testimony, is whether or not the Warner amendment unfairly deprived these veterans of a course of action.

Finally, I would like to make just one general comment. We of the American Legion certainly recognize and respect the political courage that it took Senator Warner to co-introduce this legislation. It would be unfortunate to lose sight of this courage as we criticize an amendment bearing the Senator's name.

Thank you.

Senator MCCONNELL. Thank you very much. We appreciate all of your coming.

Ms. LEGARRETA. I would like to make one final comment, if I may, Senator McConnell, and that is in relation to the consolidated cases that Judge Schwarzer recently dismissed. I want to comment that the bulk of those cases were brought by widows of deceased atomic veterans who had already tried the Veterans' Administration route for getting either service-connected death and disability claims while their husbands were alive or their dependency indemnity help after their husbands' deaths. It was a last resort, to sue the contractors just as the dioxin, the agent orange veterans were able to do earlier in the seventies. So it was definitely a last resort to try to sue the contractors out there on the coast.

Senator SIMON. If I may just ask this question: Those widows, do they feel that the U.S. Government is helping them?

Ms. LEGARRETA. The widows are very hurt and angry at what has happened to them and to their children. I do not want to belabor this committee with the personal tragedies that I view every day as the person who opens the mail for the National Association of Radiation Survivors, but the human costs of the nuclear weapons testing program has been enormous and the human cost of the Warner amendment has been enormous.

Again, I want to really compliment Senator Warner for seeing the error that he perpetrated and being enough of a Virginia gentleman to try to set it right by cosponsoring this legislation.

Thank you, Senator McConnell.

Senator MCCONNELL. Thank you very much.

The final witness, there are two people who will sit with him, but the final witness is Irwin Welber, president of the Sandia National Laboratories, in New Mexico, accompanied by Philip Coyne, executive officer of the Lawrence Livermore National Laboratory,

in California, and Dr. Karl Braithwaite, executive assistant director of the Los Alamos National Laboratory, in Los Alamos, NM.

It is my understanding that Mr. Welber will be the spokesman. Please go right ahead.

STATEMENT OF IRWIN WELBER, PRESIDENT, SANDIA NATIONAL LABORATORIES, ACCOMPANIED BY PHILIP E. COYLE III, EXECUTIVE OFFICER, LAWRENCE LIVERMORE NATIONAL LABORATORY; AND KARL R. BRAITHWAITE, EXECUTIVE ASSISTANCE DIRECTOR, LOS ALAMOS NATIONAL LABORATORY

Mr. WELBER. Thank you, Senator McConnell.

My name is Irwin Welber, president of the Sandia National Laboratories. I appreciate the opportunity to appear before you today. I am not here to oppose relief for our veterans, nor am I the proper person——

Senator MCCONNELL. Would you pull the microphone a little closer to you.

Mr. WELBER [continuing]. Nor am I the proper person to defend the decisions or strategic policies of the U.S. Government.

I am here because the outcome of your deliberations will affect the work of the national laboratories. I want to share with you some of the significant considerations that you should weigh in your decisions.

AT&T is the corporate parent of the Sandia Corp. This has been true since 1949 when President Truman personally appealed to AT&T to take on this responsibility. Indeed, AT&T agreed to accept this function in a sense of national civic responsibility. We have operated since then on a no-fee, no-profit basis.

Sandia has a major role in national security weapons research and development. This activity involves testing and the decisions to test were made and directed at the highest levels of the U.S. Government. Those decisionmakers had access to global and national security information to guide those decisions.

The Government carried out the actual weapons tests and the laboratories provided the scientific support function. The U.S. Government not only directly carried out such testing, but also decided to place military personnel in those duty assignments on which our veterans now base their claims.

Sandia did not then, and does not now, direct any of the deployments or placements of members of the U.S. armed services. Veterans are now presenting claims that exposures to nuclear weapons testing caused them serious health problems. We have great sympathy and concern for these individuals. They are veterans for us all. They served us all and they served our country.

And while we have no knowledge of the merits of any specific claim, we share the concern of all citizens that those who feel they can prove harm, should be fairly and justly treated.

However, in S. 2454, Sandia National Laboratories will be made to defend itself in court suits. The laboratories which have been used as the instruments of national policy will be made to stand to defend these defense programs executed by the Government under its specific and exclusive statutory authority. We would effectively

have to defend as well, the placement and deployment of military personnel who were not under our control.

The solution is not to place in jeopardy the scientific professionals who provided support for Government tests, nor to put the corporate good citizen on the dock. The solution is to make administrative avenues of relief work and if these avenues do not work they should be made to do so.

To expose the Sandia scientific community as well as Los Alamos and Livermore and AT&T and the University of California to such trials would place in very serious jeopardy our special relationship, one which has been credited with creating a unique environment for scientific innovation.

Indeed, we have been able to attract scientists and engineers with unique capabilities to pursue national defense goals with vigor and effectiveness. It would be most unfortunate if the results of this type of legislation were to be the withdrawal of the best and brightest in the scientific community from the fields of weapons technology. Likewise, our no profit corporate sponsors, AT&T, faced regular challenges at its annual stockholders meetings where shareholders opposed the company's continued participation in this program. Withdrawal of that sponsorship would ill-serve this Nation.

We believe that to open a process of judicial review by a disparate array of State and Federal courts, operating under a wide range of laws, creating decisions directly impacting the Nation's defense could cause irreparable harm to the U.S. weapons program. We cannot see how such a result would serve the interests of any citizen.

These points and others are developed in my written testimony. Thank you very much.

[The prepared statement of Mr. Welber follows:]

Testimony of Irwin Welber
Sandia National Laboratories

June 27, 1986

I appreciate the opportunity to appear before you on behalf of Sandia National Laboratories to present our views of S.2454 and its impact upon both the nation's nuclear weapons program and national security interests. There are many points that I could cover but I will focus upon several of the more serious problems which this bill presents. Briefly stated, these are:

1. The United States is the real party in interest and the only proper party to defend the United States' nuclear weapons testing program. The National Laboratories are owned by the government, work exclusively for the government, and, in the testing of nuclear weapons, assist in performing tasks that only the United States can, by law, perform. In assisting the United States, Laboratory personnel act only on behalf of the United States to ministerially perform the tasks and assignments given to them by government officials.

2. The nation's State and Federal courts are, and historically have been, regarded as improper forums for deciding questions of national policy, such as the testing of nuclear weapons.

3. The nation's decisions regarding atmospheric nuclear testing were made at the highest levels of the government, based at least in part upon information which was often very technical, complex and highly secret. It is not in the nation's interests to publicly reexamine the appropriateness of those decisions in the courts. The National Laboratories did not make those decisions and were not privy to the decisional process. The Labs are, therefore, not in a position to be able to justify in court the decisions of the President, the Atomic Energy Commission, the Department of Defense, and other Federal agencies.

4. Radiation litigation for the most part involves health effects which are not at present susceptible to reliable scientific proof that can be demonstrated in court. If these cases were to be tried outside the Federal Tort Claims Act (FTCA), they would be considered under varying State tort liability standards, possibly including strict liability or ultrahazardous activity doctrines and punitive damages. The cases might also be tried by juries, whose awards can be expected to be inconsistent and unpredictable, creating chaos rather than justice. It promises to further overburden the judicial system with cases that are extremely expensive to process.

5. The appropriate channel for satisfying legitimate claims of this character is through the administrative process which Congress has already established to deal with deserving claims.

6. The effects of this type of litigation and the sensational media coverage which would go with it can do grave harm to the National Laboratories' continued participation in the weapons program. We might reasonably expect an adverse effect upon public attitudes affecting national policies in the area of weapons research, development and testing. Moreover, it is fundamentally unfair and unjust to require the National Laboratories to carry the burden of defending the government's conduct of nuclear tests. The future of the National Laboratories could lie in the balance.

Before addressing these points in order, I will first briefly explain the history of the nuclear weapons National Laboratories and specifically Sandia National Laboratories.

In the Fall of 1949, President Truman made a personal appeal to AT&T to assume the management of what was to become Sandia National Laboratories. The nation's nuclear weapons research and development in both devices and ordnance was then being conducted

by the Los Alamos Scientific Laboratory, which was under the management of the University of California. As everyone familiar with the history of that time is aware, development of the atomic bomb had been concentrated at Los Alamos, New Mexico, as part of a massive effort involving secret installations at various locations around the country under the control of the Manhattan Engineer District.

With the end of the Second World War, the research and development effort continued at the laboratories which were later to become formally designated by Congress as "National Laboratories," including Los Alamos National Laboratory, Lawrence Livermore National Laboratory and Sandia National Laboratories. These National Laboratories have been operated by "managing government contractors", the University of California and AT&T, as a public service without profit.

The phrase "managing government contractor" is very significant in that these contractors are unlike other types of contractors. The National Laboratories have been managed and operated by government contractors who have had no financial interest in the physical laboratories or ownership of any of the properties. All assets and property at the laboratories are owned by the United States. Every aspect of the operations of these National Laboratories has been for the government and under the direction and control of the government. All funds to operate the National Laboratories have been government funds advanced and expended under cost contracts. These Laboratories and their parent institutions are fully indemnified by the government for any liability arising from their performance of this work. Except for the fact that the Laboratories are privately managed and that the personnel are not government employees, the activities of the National Laboratories have been, for all intents and purposes, activities of the Federal Government. In hearings in 1983 on Section 213 of H.R.2797, which was a predecessor of Section 1631, the Department of Justice testified that:

> "These contractors were and are utilized by the United States as instruments of national policy to assist in an entirely governmental task--nuclear weapons research, development and testing. Further, the government reimburses these contractors for any liability arising out of their assistance in the weapons program, including the costs of litigation. The use of the contractors to implement national policy and perform a uniquely governmental function cannot be disputed. Therefore, it should be perfectly clear that, for the purposes of civil litigation arising from atomic weapons testing, the proper party defendant is the government. Only the government sets policy, makes decisions, and controls activities and circumstances regarding atomic weapons testing." (Transcript of Proceedings, Committee on the Judiciary, House of Representatives, Hearing on H.R.2797, June 7, 1983)

This management mode has been followed since enactment of the Atomic Energy Act of 1946 and has been credited by most observers with contributing significantly to the success of this nation's research and development effort in the area of nuclear defense. Today the National Laboratories represent collections of some of the free world's finest minds, experience and talents. Preeminent scientists, engineers, technicians, and administrators, totaling approximately 24,000 persons at the three nuclear weapons National Laboratories conduct the research and development necessary to our nuclear defense. Other National Laboratories and managing government contractors have also contributed to the success of the nation's nuclear weapons research and development and testing programs.

By law only the United States can conduct nuclear testing and any personnel of the Laboratories who have assisted in that process have acted under the most stringent controls, in a ministerial role, carrying out the directions and orders of civilian and military government officials responsible for conduct of the tests.

The test sites where atmospheric testing was conducted were wholly owned or, in the case of the Pacific, occupied by the United States. In the Pacific this was in the Marshall Islands and in the Continental United States, this was at the Nevada Test Site, where underground testing is still conducted today. A few tests were conducted at other locations but substantially all tests were carried out at these two areas. The location of all test sites was determined and controlled by the United States. The decisions

concerning atmospheric testing were made at the very highest levels of government, after weighing all the risks and the political, diplomatic and military information then available, much of which was available only at that high level. As required by law, the President personally approved each of the test shots. The military branches usually supplied logistic and operational support as well as personnel support for a variety of military tests and experiments. The placement of military personnel was the responsibility of the military. Various government agencies, including the Public Health Service, supplied radiation measurement and safety services. Weather forecasts and observations were the responsibility of a variety of Federal organizations.

The National Laboratories carried out only the assignments given to them by government officials and were under the direct control of those officials with respect to all aspects of the testing. In the case of Sandia personnel, the involvement was largely limited to providing the technical support to arm and fire the device and make the desired scientific measurements.

The report of the Senate Committee on Armed Services recognized all this in 1983 when considering the purpose of the predecessor to Section 1631 then under consideration. The Senate report was quoted by Judge Schwarzer in his opinion upholding Section 1631 in Consolidated Nuclear Radiation Litigation reported at 616 F.Supp. 759 (N.D. Cal. 1985):

> "Each nuclear test that has been made since 1946 has been made under the statutory direction of Congress. Each nuclear test has been approved, before the fact, by the President of the United States. Each nuclear test has been made under the direct supervision of government officials. Each nuclear test has been participated in by hundreds, and in some cases thousands, of government officials and military and civilian personnel.
>
> "The committee recognizes, as has the Congress, that the military applications of atomic energy could not proceed either technically or economically without the participation of organizations that possess both scientific management skills and a high degree of scientific and technical expertise.
>
> "Several such organizations were placed under contract almost at the inception of the nuclear weapons program in 1942 and have performed in an outstanding manner in the national interest for more than three decades. These organizations have provided scientific, engineering and technical support for nuclear tests carried out by the government and for the

> government in the exercise of a governmental function, i.e., providing for the national defense. These organizations did not order the tests to be performed; they did not set the times or places for the tests; nor did they direct military or civilian government personnel to participate in them." (S.Rep. 98-500, 98th Cong., 2d Sess. to accompany S.2723, p. 376), Consolidated, 616 F.Supp. 759, at p. 765.

It is against this background that Section 1631 (42 U.S.C. 2212) was passed in October, 1984. The Constitutionality and soundness of this law was explained by Judge Schwarzer thusly:

> "The Act applies only to activities conducted under the closest control of the government, undertaken on authority from the President, capable of being performed solely by the government and inextricably interwoven with national security. Thus, to the extent due process requires demonstration of a rational basis for legislation controlling claims arising out of these activities, that requirement is amply met. . . . (Id at p. 766.)
>
> "Thus the claims arise out of circumstances and activities peculiar and unique to the government as sovereign. They are the product of acts and decisions by the government undertaken for purely governmental purposes. They can in no way be equated with the claim of an injured person against a private tortfeasor. See Feres, 340 U.S. at 141-42.
>
> "These considerations, in the aggregate, present ample grounds for treating plaintiffs' claims as subject to the continuing control of Congress."

Id, at pp. 769-70.

Judge Schwarzer also recognized the effect that radiation litigation was having on those who served the nation's will, and the effect on the nation's interests:

> "The record here demonstrates that Congress sought to deal with important national concerns raised by the proliferation of claims arising out of the nuclear weapons testing program: that negative public perception of the contractors' role in the program might jeopardize their continued participation; that actions against contractors threatened to disrupt the nuclear weapons program; and that the government was the proper party to defend claims arising out of purely governmental activities. . . ."

Id at p. 768.

The report of the House Committee on Armed Services made this same point in reporting out Section 213 of H.R.2797:

> "In addition the committee does not believe that any contractor should be used as an instrumentality of the government and then abandoned when inundated by a flood of litigation arising from that same government activity." (H.R. Rept. 98-124, Part I, 98th Cong. 1st Sess., June 15, 1983, p. 30.)

My first point is that the United States is the only proper party and, indeed, the only party capable of defending its own testing program. The quotations I have presented and the facts supporting those quotations are self-evident.

Certainly one of the most serious problems posed by this legislation is its impact on fundamental legal and even Constitutional policy. In presenting my second point, I must mention that I am not a lawyer but I do have an understanding of the basic legal notions underpinning my comments.

The nation's courts historically have been regarded as improper forums for deciding questions of national policy. Our system of government recognizes a separation of powers between the three coordinate branches of government and that they are not to impinge upon the functions of one another. When the Executive Branch, including the military, has made a judgment that certain weapons development activities and testing are necessary in the nation's interests and that certain risks should be assumed in the nation's interests, those decisions are immune from attack in the courts. Many groups and individuals would be eager to challenge the nation's defense programs in the courts. Allowing them to challenge the risk assessments and testing decisions of the United States from 1945 to date could do untold damage.

It is my understanding that courts historically have recognized that high-level government officials should not have their difficult decisions second-guessed in courts all across the land. This same reasoning supports the May 27, 1988, decisions of the Fourth Circuit in the Fraser, Boyle and Bowl cases. Those decisions uphold extension of government immunities to defense contractors where the designs of various military aircraft were formulated with full involvement of the military. In those cases the court disapproved any judicial second-guessing of the military decisions by allowing the contractor to be sued.

This leads to my third point which is really an elaboration of the reasons why litigation concerning national nuclear weapons policy would be contrary to the nation's defense posture and welfare. As I have already pointed out, weapons development and testing decisions have been and still are typically based upon high level assessments of research and development priorities, military

needs, economics and a weighing of the risks. We should assume that this includes a careful assessment of friendly and hostile technical and military developments. Common sense would also suggest that the President and his intelligence and military advisors are kept fully informed of highly sensitive information concerning the need for new weapons development, the urgency of that development and all available alternatives. The President makes the ultimate decision on each nuclear test. The officials who are entrusted with that responsibility have the information, experience, expertise and sophistication to make such decisions in the nation's best interests.

As Judge Schwarzer observed:

> "A court would be ill-equipped to evaluate the judgments concerning safety made by those officials based on the exigencies of the moment. Any attempt to do so would, moreover, require a comprehensive reexamination of the conduct of the tests and the decisions made during their course which would itself defeat the purpose of the exception. The consequences of such a reexamination would be to hamper the government in its future conduct of weapons tests and similar operations affecting the national security."

Consolidated, supra at p. 774.

This is especially true if State and Federal judges and juries throughout the land were free to come up with conflicting decisions, particularly when some, or perhaps much, of the critical information that was part of the decisional process would be unavailable or unintelligible to the trier of fact. In this regard, I should emphasize that the National Laboratories were at most contributors of information used in the decision-making processes involving nuclear testing. For the most part, we were not privy to high-level military and diplomatic intelligence, and we do not now have access to all of the documentation or information from which those decisions could be reconstructed. If we are to be required to defend litigation in which the propriety of those decisions is under attack, the Laboratories can only answer that the decisions were made by federal officials. The National Laboratories themselves could make only a feeble effort to explain or justify those decisions. Requiring the National Laboratories to justify the discretionary decisions of the Executive and military branches is not only unwise, it is also unjust.

The fourth concern centers on the nature of the injuries involved in this litigation. The medical or pathological effects of low-level ionizing radiation is perhaps one of the most widely and thoroughly explored subjects of all time. Countless studies have been conducted and to this point at least, there is very little reliable evidence to suggest that diseases are caused by low-level radiation. Congress has itself ordered further studies to determine the probability of adverse health effects from low-level doses. A set of probability tables was proposed pursuant to the Orphan Drug Act but those tables are undergoing further review, illustrating the uncertainty on this subject. Although various carcinogens have been identified, their involvement, singularly or collectively, with any individual case of cancer cannot reliably be established by present-day medical science.

Nevertheless, S.2454 would create a special class of plaintiffs who would be able, through the National Laboratories, to sue the United States for making the decision to conduct testing. Cases would be considered under varying State tort liability standards, possibly including strict liability or ultrahazardous activity doctrines and punitive damages. S.2454 virtually guarantees that awards would be inconsistent and unpredictable and would reduce the benefit to all because of the time and expense of litigation. This, to me, underscores the need to resolve this issue in the medical laboratories and administrative agencies of the United States, not the courts.

This leads to my fifth point. If persons have injuries as a result of low-level radiation exposure, then it is the responsibility of the United States to construct a mechanism to compensate any who suffered. Congress has already recognized this to be a national issue that must be resolved equitably by the Federal Government; for example, by providing for veterans' benefits and relief, by commissioning the search for correlations between adverse health effects and exposures to low-level radiation, and by establishing a process for reconstruction of radiation exposures where records are missing or non-existent, resolving all reasonable doubts in favor of the veteran.

In the case of the Marshall Islands, where the Pacific testing occurred, Congress created a special fund and a special Claims Tribunal to administer claims of the Marshall Islanders. This $150,000,000 fund and the Claims Tribunal process were created under Section 177 of the Compact of Free Association and the Bilateral Agreement implementing Section 177. The Compact was signed by President Reagan on January 14th of this year.

Administrative procedures offer the best promise of consistent results, avoidance of exhaustive discovery procedures that would attempt intrusion into sensitive and classified documents, and efficiencies that would save countless millions to the claimants and government alike. But, most importantly, an effective federal administrative procedure ensures that the problem is being directly addressed by the Congress and agencies, not passed off to the courts by encouraging litigation against the National Laboratories who merely performed the mission they were given.

Congress has started the process and the initiatives Congress has taken need time to succeed. If the administrative processes are inadequate, it is the responsibility of the United States to make necessary improvements in the system. The administrative process should not be abandoned in favor of wholesale litigation against the National Laboratories.

My final important point is that litigation attacking the safety and propriety of the testing program can be expected to generate sensational media treatment and threaten to do irreparable harm to the National Laboratories' continued participation in the present nuclear weapons defense effort. There is little reason to suppose that information regarding these tests is going to be either accurately or fairly presented in the context of tort litigation. Litigation is itself a process of advocacy often aimed toward over-emphasis and exaggeration and presented in an emotional context. Trials are by their very nature sensational. Against this background, we can expect that the national defense policies of the United States and, in particular, its nuclear weapons

research, development and testing policies, will be neither fairly presented nor understood. This could certainly lead to adverse public reaction to policies which would not be opposed if explained or understood in a more dispassionate forum.

The National Laboratories have always been fully indemnified by the United States and could not realistically be expected to undertake their mission without that indemnity. That indemnity does not, however, protect the reputations of the National Laboratories and scientists working there. The Laboratories have recruited some of the nation's most talented and promising people to perform a vital mission in the national defense. The lawsuits filed against the Laboratories announce to the world that the Laboratories and scientists -- not the United States -- must personally justify and defend the United States against charges which include recklessness, incompetence, genocide, and military human experimentation. The scientists who agreed to work at the Laboratories did not agree to answer such accusations.

AT&T is also faced with explaining to its public, shareholders, and customers why the Laboratories, and not the United States, are being charged and held to account for atomic testing.

AT&T has, from time to time, been the object of criticism due to its role as corporate parent to the company which manages Sandia National Laboratories. At the annual Shareholders' Meetings, resolutions are routinely proposed to require AT&T to discontinue its role as parent of Sandia Corporation. This criticism has been answered with assurances that Sandia and the AT&T companies are fully indemnified against liability and, although receiving no fee or profit, the management of AT&T is convinced that this is a vital service in the nation's defense and should be continued.

AT&T had concerns and hesitancy about this role initially and agreed to assume the task only after the personal appeal of President Truman. I would expect that concern to increase if there is any announcement by the government that we are not performing a

Federal role when we perform this Federal mission. These concerns were recognized by the First Circuit Court of Appeals earlier this year in its decision in Hammond v. U.S.A., 786 F.2d 8, which upholds the Constitutionality of Section 1631:

> "Congress has nevertheless perceived these lawsuits to constitute a threat to the continued participation of the private contractors in the nuclear weapons program because the contractors fear the bad publicity generated by the suits. The contractors testified before Congress that the lawsuits have led the public to blame them for the formulation, implementation and execution of the atomic weapons testing policy of the United States. H.R.Rep. No. 124, Part 4, 98th Cong., 1st Sess. 2-3 (1983). They also testified that the lawsuits result in a diversion of human and financial resources away from research and testing activities and into litigation and, therefore, seriously disrupt their participation in the program."

Hammond, 786 F.2d 8 at p. 14.

Although we at Sandia feel that our management role is vital to the nation's defense, we should not be required to defend the United States' weapons testing program. If the National Laboratories and their parent organizations are going to be required to defend that program, this Committee could reasonably expect the managing government contractors for the National Laboratories to reexamine their reasons for continuing management of the Laboratories.

Aside from financial indemnity, the only other form of government assurances that can be meaningful to the managing government contractors is an explicit acknowledgment by the United States that it, and it alone, is responsible for atomic testing; that it will defend and will resolve national issues relating to the weapons testing program. Section 1631 confirms that well-understood commitment.

The National Laboratories are not the proper defendant. It would be unjust to have enlisted the Laboratories and their scientists in the most awesome undertaking of all time only to then declare that, laying their reputations on the line, they must personally answer for the United States.

Thank you for this opportunity to present my views.

Senator MCCONNELL. Thank you, Mr. Welber.

I assume you other gentlemen have statements as well and we will make those a part of the record.

I have just a couple of questions and then I must depart. The Senate went out last night and it could be that I am the only Senator left in town and I must leave shortly as well.

You have testified that the national laboratories occupy somewhat unique position in their relationship with the Federal Government. Would you clarify exactly how your position differs from that of other private contractors?

Mr. WELBER. In essence, the national laboratories in connection with the DOE and DOD constitute a vertically integrated structure for the research, design, development, manufacture, and utilization of nuclear weapons. This is unique in that it is in essence a team which creates or helps to create the defenses of this country.

Senator MCCONNELL. You have expressed concern that the exposure of the national labs to civil liability would have an adverse impact on your contribution to our national defense. Exactly how would this affect both the contractor labs and our national defense?

Mr. WELBER. Perhaps at this point I should point to my colleagues who might like to comment on that from their point of view.

Senator MCCONNELL. All right.

STATEMENT OF PHILIP E. COYLE III

Mr. COYLE. If I may, I would like to read in answer to that a section from the hearings in 1983 on section 213 of H.R. 2797, which was a predecessor of section 1631 which we are discussing today. That portion came from the Department of Justice, which described our role, the role of the national laboratories as follows:

> These contractors were and are utilized by the United States as instruments of national policy to assist in an entirely governmental task, nuclear research, development, and testing. Further, the government reimburses these contractors for any liability arising out of their assistance in the weapons program, including the costs of litigation. The use of the contractors to implement national policy and performing a uniquely governmental function cannot be disputed, therefore it should be perfectly clear that for the purposes of civil litigation arising out of atomic weapons testing, the proper party defendant is the government. Only the government sets policy and makes decisions to control its activities and circumstances regarding atomic weapons testing.

I think that quote from those earlier hearings is a good description of the role we play.

Senator MCCONNELL. Mr. Braithwaite.

STATEMENT OF KARL R. BRAITHWAITE

Mr. BRAITHWAITE. If I could comment on that same question, the University of California has submitted a letter which I would like to make sure is formally put in the record which might be useful to——

Senator MCCONNELL. The professor wanted to see it, too.

Mr. BRAITHWAITE. Yes. I think it might be good to quote from the last page, because it helps identify the kind of unique contractual relationship. Professor Fletcher referenced this and I think there is some misconception in terms of these laboratories being just like other contractors. That is not the case and the contracts are uniquely different. That should be examined before people make that assumption.

The contracts that are with the University of California and with Sandia are very different instruments that really place the labora-

tories very closely as a team with the Government in making decisions, and it is that sort of unique relationship that I think is addressed by the University of California's letter. The sentence I would like to quote is the following:

> The continuation of the relationship of mutual trust and cooperation between the government and the university which is essential to the continued relationship would be jeopardized by the repeal of 1631.

I think Mr. Ofte's testimony addresses this very much and I think it should be considered very carefully by the committee because it identifies that kind of unique relationship that has existed from the beginning and is a strong reason as to why the Government really should be in the lead on this litigation effort, rather than the contractors.

Thank you.

Senator McConnell. I conclude the hearing by saying that today is a perfect illustration of a really vexing problem that we are wrestling with in this country today, the rights of litigants on the one hand versus in the case of the private sector the rights of the insurance premium paying public or in the case of the public sector the taxpaying public, and this struggle, as you know, has come to the front burner in American society today. The front burner issue around this town is defined as the cover of Time magazine and a segment on 60 Minutes, and both of those things have happened as a result over in the private sector of the liability insurance crisis. We have had lots of arguments about what is causing that, whether it is the insurance company conspiracy or the crush of too much litigation, but nevertheless the issue really is in a macrosense that the balancing of the rights of individuals who are legitimately aggrieved and no one wants to restrict their rights to recover versus the rights of society at large to be protected against lawsuits that are unwarranted. And I think it is a very complicated, difficult question.

And for me as someone particularly interested in this whole area, the hearing today has been very helpful and I want to thank all of you for coming. This hearing is now concluded.

Thank you.

[Whereupon, at 11:48 a.m., the committee was adjourned.]

[The prepared statements of Mr. Coyle and Mr. Braithwaite follow:]

Testimony of Philip E. Coyle III
Lawrence Livermore National Laboratory

June 27, 1986

I wish to thank this distinguished Committee for the opportunity to present testimony today on behalf of the Lawrence Livermore National Laboratory which is operated by the University of California.

In the early days of World War II, President Roosevelt initiated the Manhattan Project. Since those early days, the University of California has managed scientific laboratories involved in nuclear weapons design efforts, at the bequest of and as a non-profit public service to, the federal government. These laboratories, first at Los Alamos and Berkeley and later at Livermore, are managed by the University and operated by University employees, but all laboratory facilities and equipment are owned by the United States. The laboratory projects and tasks are assigned and controlled via contracts issued by the Department of Energy, a civilian run organization; these projects and tasks are scrutinized and funded by Congress. The design objectives and needs are defined by the Department of Defense. It has been a long standing national policy that nuclear weapons designs must be proven out by actual tests. The view has been that the Nation would not have a credible deterrent if based on weapons that no one was sure would actually work. National authorities have also been concerned with determining the specific effects of nuclear detonations on military facilities and equipment and how military tactics must be altered in light of the nuclear battlefield threat. From such considerations, the Nation's nuclear testing program evolved. The earliest nuclear tests were supported by University personnel from the Los Alamos Scientific Laboratory and the University of California Radiation Laboratory at Berkeley.

Since the formulation of Lawrence Livermore National Laboratory in 1952, University personnel at LLNL have also been involved in the Nation's nuclear testing program. But never during this period of involvement have such University personnel been in command of, or set the day-of-test location of, the military forces involved in the testing program. The University did not establish exposure standards or approve

exceptions to exposure standards for military personnel. Nor did the University control the type or number of military personnel involved in the testing program. Further, the University did not suggest, direct or participate in war game maneuvers by military personnel at the test sites.

Throughout this period of University involvement, a senior military officer or a senior federal official has always been in formal command and actual control at each and every nuclear test. And, each and every nuclear test has been authorized by the President of the United States.

The national laboratories managed by the University have focused on determining whether, and to what extent, different theoretical nuclear weapon design concepts could lead to efficiently functioning weapons for the Nation's nuclear deterrent arsenal. In hearings in 1983 on Section 213 of H.R. 2797, which was a predecessor of Section 1631, the Department of Justice described our role, as nuclear weapons contractors, as follows:

> "These contractors were and are utilized by the United States as instruments of national policy to assist in an entirely governmental task--nuclear weapons research, development and testing. Further, the government reimburses these contractors for any liability arising out of their assistance in the weapons program, including the costs of litigation. The use of the contractors to implement national policy and perform a uniquely governmental function cannot be disputed. Therefore, it should be perfectly clear that, for the purposes of civil litigation arising from atomic weapons testing, the proper party defendant is the government. Only the government sets policy, makes decisions, and controls activities and circumstances regarding atomic weapons testing."

The larger issue, of whether or not this Nation should pursue nuclear weapon development and testing, has always been an uniquely federal decision, made at the highest levels of government and based on the federal government's determination of what was in the best interest of this Nation. Therefore, the proper party of interest in law suits challenging the propriety and conduct of nuclear testing is the federal government.

The Lawrence Livermore National Laboratory takes no issue with the just

compensation of persons having sustained injuries resulting from radiation exposure if those injuries are shown truly to be connected with such exposures. The nation's veterans deserve all due process in this regard. Federal administrative processes exist and, if necessary, should be modified to resolve these issues with fairness and equity. But repeal of §1631 would place the University of California in an inappropriate litigation defense role. First, if it is appropriate for a jury to reevaluate federal executive decisions on whether and how to conduct nuclear tests, justification for such decisions should be presented by representatives of the federal government, not the University of California. Such federal decisions involve the interplay of diplomatic, political, economic and military considerations totally outside of the University's experience and responsibility.

Second, even today, there are large numbers of documents related to the nuclear testing program and policy related papers from organizations such as the National Security Council which are considered highly classified and as such are protected by the security restrictions of numerous federal agencies. The University does not have access to such documents and papers or the authority to deal with any related declassification efforts for trial purposes. That access and authority appropriately lies only with the federal government.

Third, federal agencies, including the Defense Nuclear Agency, Department of Defense and Department of Energy, have spent years and millions of taxpayers' dollars, to reconstruct events and doses for the hundreds of thousands of people who participated in the atmospheric nuclear testing program. If these reconstructions are explained to juries, the appropriate entity is the federal government, who directed these complex and extensive studies, not the University of California.

Fourth, the dose reconstruction studies indicate that the average soldier received roughly one-fifth of the dose that national and international organizations have set as the yearly allowable dose for an atomic industry worker. Tort lawsuits would involve plaintiffs' lawyers asking lay juries to challenge those standards and to retroactively set their own, perhaps much lower standards. Clearly the University of

California is not the appropriate entity to defend the national standards.

Licensing tort actions against a broad spectrum of nuclear weapon contractor defendants would result in multiple defendants, each defendant with its own set of defense attorneys which, in turn, will result in multiple court filings and appearances, multiple fact finding efforts and legal research projects, as well as multiple sets of experts, reconstruction studies and discovery exchanges, all at the taxpayers' expense. And a truly extended background presentation would be required again and again before each new jury to allow that jury to deal with even the most basic concepts and terminology that jury would face. The massive scope of operations and the complexities and controversies, associated with alleged links between cancer and low level radiation, would result in trials lasting months, before juries truly strained to grasp the involved operational details and the sophisticated medical and technical issues. By repeal of §1631, the Committee will not be simply providing the litigants with an opportunity for a "day in court". The Committee would be opening the door for an enormous number of law suits which, while possibly providing a long term, full employment program for trial lawyers, would assure only a speculative chance that those alleging injury would actually receive any compensation as a result.

There were roughly a quarter of a million "atomic vets". Statistics indicate that, totally exclusive of radiation, roughly one in three will contract cancer. Based on nationally prevalent cancer rates, roughly one in six will die of cancer. All might argue fear of cancer. It seems unrealistic to require the tort system to deal with that number of cases. The national laboratories, such as LLNL, pursue highly complex scientific tasks, selected by the Executive and Congressional branches of the federal government, as a public service and on a not-for-profit basis. These critical scientific tasks would be seriously impacted if the national laboratories must divert a great deal of manpower and management attention to defense of a vast array of tort cases. These law suits, by their very nature, would result in highly inflammatory accusations via pre-trial publicity. Under this scenario, we would be

but surrogate defendants, chosen as legally convenient targets because servicemen can't successfully sue the federal government. This is of special concern as it strikes at our only "capital", our reputations and our ability to attract and hold the finest technical talent in this country. Without that talent, we lose the ability to serve this country.

Authorizing a near endless stream of tort cases would be an incredibly expensive undertaking and one unlikely to produce uniform and equitable results. Lay juries, overwhelmed with complex sets of facts and technical opinions, would be sporadically vulnerable to simplistic and emotional tactics. A less adversarial system, before specially educated and trained finders of fact, seems necessary.

Relative to nuclear weapons, design, development and testing efforts, the University has always performed under non-profit contracts with the federal government that fully indemnify the University for all expenses and payments arising from the type of law suits we have addressed today. We have no "profit or loss" stake in this difficult matter. With full consideration of that factor, we urge the distinguished members of this Committee to maintain an administrative hearing type of claims process as the appropriate method of dealing with this situation. Long ago, the Congress decided that veterans' claims should be handled by the Veterans Administration. Creating a special class of veterans encouraged to litigate against surrogate defendants serves neither the veterans nor the national interest. Again, we point out that we do not argue that if veterans have actually been injured, such veterans should not be fairly compensated. If the present claim process is considered inadequate, the correct response would appear to be improvements in that process to better serve both national and veterans' interests fairly and efficiently.

Thank you very much for your time and attention.

STATEMENT TO THE SENATE JUDICIARY COMMITTEE

ON S.2454

WHICH WOULD REPEAL SECTION 1631 OF

THE DEPARTMENT OF DEFENSE AUTHORIZATION ACT

OF 1985

JUNE 27, 1986

KARL R. BRAITHWAITE

EXECUTIVE ASSISTANT DIRECTOR, LOS ALAMOS NATIONAL LABORATORY

OPERATED BY THE UNIVERSITY OF CALIFORNIA

Mr. Chairman and Members of the Committee:

I appreciate the chance to appear before you and to address you on S.2454 which would repeal section 1631 of the 1985 DoD Authorization Act. I urge you to retain section 1631 as the correct method of responding to litigation arising from nuclear testing. My presentation will be brief since Los Alamos can say that we wholly subscribe to the written presentation by Sandia's President Welber.

The federal government, in fulfilling its responsibility to defend the nation, created the national weapons laboratories pursuant to the Atomic Energy Acts of 1946 and 1954. Under these Acts, the government controls the conduct of nuclear weapons testing, supported by the Laboratories and other contractors. Testing of such devices requires the specific written approval of the President. As Mr. Ofte says in his written remarks, "The acts of these contractors in conducting atomic weapons testing were the acts of the United States."

Section 1631 of the 1985 DoD Authorization Act recognizes the unique relationship between the government and its nuclear weapons laboratories permitted by the Atomic Energy Acts. The extraordinary authority conferred by these Acts facilitated and enhanced the nuclear defense capability of this country. Only the federal government has the power to assure that the national security interests are served by such complex experiments as nuclear device detonations. The national weapons laboratories, some of which are operated by non-profit,

as the contractors, provide the support required by the government to meet the national defense objectives of such tests.

The fact of the matter is simply that nuclear weapons testing is a purely governmental function. It has been, for the past 40 years, an essential element of this nation's defense strategy. That strategy was set at the highest level's of government. The government set the standards, supervised the work, and established the mechanism whereby this nuclear defense capability has developed.

Section 3431 identifies the United States as the real party in interest in cases arising out of nuclear testing. It recognizes that the decision to develop nuclear defense capabilities was made at the highest governmental policy levels. It reflects those who bring actions against the contractors, to existing administrative procedures and the Federal Tort Claims Act. The defense of litigation challenging the conduct of the weapons testing program should likewise be vested exclusively in the government. Section 3431 recognizes this policy as well.

It seems to me that we are here today because of a concern over fairness. There are three competing interests: First, those individuals who perceive themselves or their decedents to have been harmed by their participation in nuclear weapons test events; second, those organizations which, through their contracts with the government, provided the technological or other support to the government in its conduct of such events; and third, the government itself which has the responsibility and the exclusive power to direct the performance of such tests.

DOE do not believe it is fair or wise to expect the contractors to assume the burden inherent in defending the policy decisions made at the highest level of government regarding the nuclear weapons testing program. Those decisions are at issue in the litigation which generated Section 3431, and if it is to repealed, the contractors will again become the real party in interest.

DOE do not believe it is fair for the government, in exclusive control of these programs, to abdicate publicly its leadership role in defending them. This will literally occur in the event Section 3431 is repealed.

We do not believe it is fair to the contractors or the taxpayers to abandon the opportunity to provide a unified, cohesive litigation defense strategy to address those cases which cannot be settled. With the contractors as the real parties in interest, each must retain separate counsel; each must formulate and assert its own defense strategies; each must pursue its own litigation objectives; each must service the defense of these cases out of its own budget. The costs of defending these cases has had a substantial impact on the weapons programs budgets allocated by DoE to the national weapons laboratories. Los Alamos and Livermore combined have committed at least six to eight million dollars through fiscal year 1985 on internal and external costs. In addition, our laboratory counsel advises that it is virtually impossible to achieve a unified, cohesive defense strategy with different counsel representing different clients with competing, conflicting and diverse litigation defense interests and objectives.

We do not believe it is fair to the government to have its national security decisions in the conduct of the nuclear weapons test program and the federal treasury subjected to the vagaries inherent in jury trials in state and federal courts nation-wide, defended by five or more contractors with armies of trial counsel. It is no secret that the contractors at the three weapons laboratories, who are the principle defendants in these cases in the absence of Section 1631, are no-fee, no-profit cost-type contracts with indemnity clauses. Therefore presumably judgments, if any, in these cases must be satisfied out of program fund allocations. This situation may easily occur if Section 1631 is repealed. The fair approach for all interested parties is to resolve this conflict with a claims commission or an analogous quasi-judicial forum to adjudicate claims at a threshold level, subject, of course, to judicial review. Our information indicates perhaps as many as 250,000 military and 150,000 civilian personnel participated in these tests from 1946 to 1963. The potential number of claims is staggering. Such a procedure would therefore seem justified, and was established in the Veterans Dioxin and Radiation Exposure Compensation Standards Act of 1984. (P.L. 98-542). In the case of the military personnel it could be argued that fairness requires a review of the Veterans Administration claims procedures and remedies These potential solutions are national policy questions that Congress should address prior to consideration of any efforts to repeal Section 1631. It is our position that Section 1631 correctly identifies the United States as

the real party in interest in these cases. That is appropriate and logical, since it was the government's decision to develop and control a nuclear defense capability. It is essential that the government be the only party in these cases; only in this way can divisive litigation defense strategies be reconciled and national security policy issues be defended. It is not inconceivable that such competing or conflicting interests may destroy the unique relationship recognized by the Atomic Energy Act. Only Section 1631 reflects the realities of the government's development of nuclear defense capabilities and the realities of defending legal challenges to those decisions. We certainly do not relish the prospect of assuming the burden of reconciling these interests and defending these policies without the visible, aggressive leadership of the government. This prospect becomes very real in the event of the repeal of Section 1631.

This concludes my prepared statement. I would be pleased to answer any questions at this time.

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